Supreme Court, U.S.
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IN THE

Supreme Court of the United States

COUNTY OF MILLE LACS,
Petitioner,

v.

MELANIE BENJAMIN, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the declaratory judgment act allows a district court to deny standing to Mille Lacs County in a reservation status controversy and circumvent the declaratory judgment precedent of this Court in *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977), squarely on point in every significant respect, involving the same type of reservation status controversy, a controversy of such compelling importance that this Court has granted petitions for writs of certiorari seven times in the last few decades to resolve similar disputes; and whether, in the process, the court can also ignore that the Mille Lacs Band, the United States and this Court, nearly a century ago, specifically recognized that the Mille Lacs Reservation no longer exists in *United States v. Mille Lac Band of Chippewa Indians*, 229 U.S. 498 (1913), when not a single court has questioned that conclusion since that time.

PARTIES TO THE PROCEEDING

The parties to this proceeding are as follows:

1) Petitioner, County of Mille Lacs, Minnesota;

2) Petitioner, First National Bank of Milaca;

3) Respondent, Melanie Benjamin, individually and officially as Chief Executive, Mille Lacs Band of Chippewa Indians;

4) Respondent, Herb Weyaus, individually and officially as Secretary/Treasurer, Mille Lacs Band of Chippewa Indians;

5) Respondent, Sandra Blake, individually and officially as District Representative, Mille Lacs Band of Chippewa Indians;

6) Respondent, Marvin Bruneau, individually and officially as District Representative, Mille Lacs Band of Chippewa Indians;

7) Respondent, Harry Davis, individually and officially as District Representative, Mille Lacs Band of Chippewa Indians.

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OPINIONS BELOW

The opinion of the district court is reported at 262 F.Supp.2d 990 (D.Minn. 2003), Co. Pet. App. 1a-19a. The Eighth Circuit Court of Appeals' opinion is reported at 361 F.3d 460 (8th Cir. 2004), Co. Pet. App. 20a-26a. The order of the Eighth Circuit Court of Appeals denying the petition of County of Mille Lacs for rehearing and for rehearing en banc is unreported, Co. Pet. App. 27a.

JURISDICTION

The district court had subject matter jurisdiction under 28 U.S.C. § 1331. This case seeks declaratory relief regarding federal Indian treaties and acts of Congress. The district court's judgment was entered on May 6, 2003. It was timely appealed to the Eighth Circuit Court of Appeals on June 4, 2003. The judgment of the Eighth Circuit Court of Appeals was entered on March 9, 2004. A timely petition for rehearing and for rehearing en banc was denied by the Eighth Circuit Court of Appeals on May 19, 2004, after a response to the petition was filed by the Mille Lacs Band pursuant to a request by the Eighth Circuit Court of Appeals. Co. Pet. App. 27a-29aThis Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. 28 U.S.C. § 2201 (Declaratory Judgment Act).

2. U.S. CONST. art. III.

3. Treaty with the Chippewa, Feb. 22, 1855, 10 Stat. 1165.

4. Treaty with the Chippewa of the Mississippi and the Pillager and Lake Winnibigoshish Bands, March 11, 1863, 12 Stat. 1249.

5. Treaty with the Chippewa, Mississippi, and Pillager and Lake Winnibigoshish Bands, May 7, 1864, 13 Stat. 693.

6. Act of January 14, 1889 (Nelson Act), 25 Stat. 642.

STATEMENT OF THE CASE

> The commission, the Secretary of the Interior, and the President, in seeking, obtaining and approving *the relinquishment of that reservation*, all treated it as within the purview of the act, and the Mille Lacs did the same.

U.S. v. Mille Lac Band of Chippewa Indians, 229 U.S. 498, 507 (1913) (recognizing that the Mille Lacs Reservation was relinquished and awarding compensation) (emphasis added).

> Based on the treaties of 1863 and 1864, *plaintiffs* [Minnesota Chippewa Tribe, including Mille Lacs Band] contend that the Mille Lac band was promised a reservation in return for their good conduct, *but* that through a series of conveyances confirmed as a result of the Nelson Act, *that reservation was taken from them.*

Minnesota Chippewa Tribe v. U.S., 11 Cl. Ct. 221, 234-235 (1986) (recognizing that the Mille Lacs Reservation was relinquished and awarding compensation) (emphasis added).

A. INTRODUCTION.

Mille Lacs County is a small county on the south shore of beautiful Lake Mille Lacs in north central Minnesota. The County is twenty (20) miles by fifty (50) miles square, with a population of approximately 25,000.

In 1855, the Mille Lacs Band shared a 60,000-acre reservation with other Indians in the northern part of the County that bordered on Lake Mille Lacs. That area is now 90% owned by non-Indians and 90% populated by non-Indians. Map, Co. Pet. App. 30a.

In the early 1900's the Mille Lacs Band sued the United States. In that suit, the Mille Lacs Band acknowledged that the reservation no longer existed, but claimed that the consideration promised by the United States was never honored. The United States agreed the reservation no longer existed, but rejected the claim for additional compensation. This Court awarded some additional compensation to the Mille

Lacs Band and recognized that the Mille Lacs Reservation no longer existed. *United States v. Mille Lac Band of Chippewa Indians*, 229 U.S. 498 (1913), Co. Pet. App. 31a-42a. In 1986, the claims court reaffirmed the relinquishment of the reservation. *Minnesota Chippewa Tribe v. U.S.*, 11 Cl. Ct. 221 (1986).

In spite of this venerable 1913 decision, and the recent reaffirmation of reservation relinquishment in the claims court, the Mille Lacs Band, now armed with tens of millions of dollars in casino profits, steadfastly maintains that the same reservation still exists. The Band cannot cite a single case that recognizes the continued existence of the 1855 Reservation. And, despite repeated requests by the Band, the United States steadfastly *refuses* to support the Band claims to the 1855 Reservation boundaries.

The County filed this declaratory judgment action because the Band has acted on their position by *formally enacting and publishing statutes that expressly recognize the disestablished reservation and claim sweeping tribal jurisdiction over everyone and everything within these boundaries*. (Specifically including "political subdivisions and their officers and agents"). Complaint for Declaratory Judgment, Co. Pet. App. 102a-160a.

A local bank, the First National Bank of Milaca, was similarly concerned with this reservation status claim and immediately moved to intervene. United States Magistrate Judge Raymond L. Erickson, in a written opinion, granted the bank's motion. (Co. Pet. App. 43a-47a). The Mille Lacs Band continues, to this day, to pursue a resurrection of the 1855 boundaries on several fronts, including federal agency recognition.

Moreover, even a cursory review of any treatise on federal Indian law confirms the injury to State or County jurisdictions from the constraints that "Indian reservation" or "Indian country" designations *necessarily* impose. In States with Public Law 280 jurisdiction (Pub. L. No. 83-280, 67 Stat.

588-89 (1953)) (codified as amended at 18 U.S.C. § 1662, 25 U.S.C. §§ 1321-24, 28 U.S.C. § 1360) the constraints are not as sweeping as in States without Public Law 280 jurisdiction. Nevertheless, in *all* States, these constraints would, by definition, be more than sufficient to confirm Article III standing in terms of injury in fact.

Pub. L. 280 grants Minnesota broad criminal and limited civil jurisdiction over all other "Indian country" within the State. *State of Minnesota v. Stone*, 572 N.W.2d 725 (Minn. 1997). However, Pub. L. 280 does not provide for state and local jurisdiction over members of Indian tribes who commit violations of "civil regulatory laws" in Indian Country. *Id.*; *See also California v. Cabazon Band of Mission Indians*; 480 U.S. 202, 212 n.11 (1987) (doubting that "Pub. L. 280 authorizes the application of any local laws to Indian Reservations").

In *Stone*, members of an Indian tribe were cited for various motor vehicle violations within the boundaries of their reservation. *Stone*, 572 N.W.2d at 726. The court held that the State lacked jurisdiction under Pub. L. 280 to enforce civil/regulatory statutes against tribal members for conduct occurring within boundaries of their reservation. *Id.* Examples of traffic related civil regulatory laws of this nature listed by the Minnesota Supreme Court include: failure to provide motor vehicle insurance, proof of insurance, driving with an expired driver's license, speeding and so forth. *Id.* at 728.

The decision in *Stone* would make civil/regulatory citations issued by the Mille Lacs County Sheriff's Office unlawful, if the area in question is within the 1855 Reservation. And while police officers, sued in their individual capacity, are entitled to qualified immunity when they could not reasonably have known that their challenged actions violated the law, *a county has no such immunity*. *Ross v. Neff*, 905 F.2d 1349, 1354-1355 (10th Cir. 1990).

The district court concluded that "future liability alone does not result in injury." *County of Mille Lacs,* 262 F.Supp.2d at 998, Co. Pet. App. 12a. However, this Court has said "one does not have to await the consummation of threatened injury to obtain relief. If the injury is certainly impending, that is enough." *Babbitt v. United Farm Workers Natl. Union*, 442 U.S. 289, 298 (1979). There is undoubtedly sufficient evidence on whether injury is certainly impending in this case.

The district court also maintained that it "must . . . assume the County's law enforcement officers will continue to protect the citizenry and avoid constitutional wrongs." *County of Mille Lacs*, 262 F.Supp.2d at 998, Co. Pet. App. 13a. How the County is expected to continue to protect the citizenry and avoid possible constitutional wrongs is puzzling, without knowing where the reservation begins and where it ends.

This Court recently touched on a related point in *Virginia v. Hicks*, 123 S.Ct. 2191 (June 16, 2003). The Court made clear that a jurisdiction suffers an injury in fact sufficient to confer standing under Art. III, when its ability to prosecute is impeded, citing *Warth v. Seldin*, 422 U.S. 490 (1975). Jurisdictions under the constraints that "Indian reservation" or "Indian country" status necessarily impose, suffer injury in this light.[1]

The State of Minnesota, as amicus curiae in support of the County, confirmed that the actions of the Band regarding the resurrection of the 1855 Mille Lacs Reservation had frustrated the legitimate jurisdiction of the State of Minnesota and the County in more than one instance. Letter Brief from the State of Minnesota, *Amicus Curiae*, in support of Appellant (08/29/2003), *County of Mille Lacs v. Benjamin, et al.*, 361

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[1] Even the brief history recently recounted in *United States v. Lara*, 124 S.Ct. 1628 (2004), documents some of the jurisdictional complications that reservation status presents. *See* also, the discussion of the substantial "confusion" in Federal Indian law *United States v. Lara*, 124 S.Ct. 1628, 1648 (2004), (Thomas J., concurring).

F.3d 460 (8th Cir. 2004). Minnesota agreed that this case should be resolved on the merits.

In addition, the State of South Dakota, as amicus curiae in support of the County, highlighted the importance of declaratory judgments in actions filed in federal court to resolve conflicting positions involving Federal Indian law in an orderly and timely fashion, without unnecessary restraint. Brief of the State of South Dakota, *Amicus Curiae*, in Support of Petitioner, *County of Mille Lacs v. Benjamin, et al.*, 361 F.3d 460 (8th Cir. 2004). South Dakota agreed that a dismissal of this case would conflict with *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977).

The declaratory judgment decision of this Court in *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977) is controlling. In this respect, this pertinent precedent clearly marks the path for this case. In the district court, the County submitted that the Eighth Circuit Court of Appeals had already affirmed two straightforward declaratory judgment actions that focused on acts of Congress and the status of reservation boundaries, on point in every respect. *City of New Town, North Dakota v. United States*, No. 1038, Mem. and Order (D.N.D. 1/26/71), *aff'd*, 454 F.2d 121 (8th Cir. 1972); *Rosebud Sioux Tribe v. Kneip*, 375 F.Supp. 1065 (D.S.D. 1974), *aff'd*, 521 F.2d 87 (8th Cir. 1975), *aff'd*, 430 U.S. 584 (1977).

Other than the disagreement regarding the status of reservation boundaries, no other underlying controversy played a role in the pleadings or the opinions in either case. Rather, the dispute specifically focused *only* on the status of the reservation boundaries.

Contrary to *Rosebud Sioux Tribe*, the district court and the Eighth Circuit Court of Appeals held that more was required to establish standing in this case. As a result, the Eighth Circuit Court of Appeals decided this important question in a way that conflicts with the relevant decision of this Court in *Rosebud Sioux Tribe*.

The district court and the Eighth Circuit Court of Appeals also ignored that the Mille Lacs Band's important claim that the 1855 Reservation still exists, conflicts with the relevant 1913 decision of this Court in *United States v. Mille Lac Band*, 229 U.S. 498 (1913).

B. DISTRICT COURT.

1. Declaratory Judgment Act, 28 U.S.C. § 2201. The district court dismissed the declaratory judgment complaint in this case, with prejudice, despite the well settled rule in the federal courts "that the Declaratory Judgment Act should be liberally construed" and is "not to be interpreted in any narrow or technical sense." *Sherwood Med. Indus., Inc. v. Deknatel, Inc.*, 512 F.2d 724, 729 (8th Cir. 1975).

Every circuit court has adopted similar guidelines for the construction of the Declaratory Judgment Act. *See Components, Inc. v. Western Elec. Co.*, 318 F.Supp. 959, 964 (D.C.Me. 1970); *Beacon Const. Co., Inc. v. Matco Elec. Co., Inc.*, 521 F.2d 392, 397 (2nd Cir. 1975); *Exxon Corp. v. F.T.C.*, 588 F.2d 895, 900 (3rd Cir. 1978); *Maryland Cas. Co. v. Boyle Const. Co.*, 123 F.2d 558, 565 (4th Cir. 1941); *Allstate Ins. Co. v. Employers Liab. Assur. Corp.*, 445 F.2d 1278, 1280 (5th Cir. 1971); *Jerome-Duncan, Inc. v. Auto-By-Tel, L.L.C.*, 989 F.Supp. 838, 840 (E.D.Mich. 1997); *E. Edelmann & Co. v. Triple-A Specialty Co.*, 88 F.2d 852, 854 (7th Cir. 1937); *Workman v. Mitchell*, 502 F.2d 1201, 1206 (9th Cir. 1974); *Ohio Cas. Ins. Co. v. Marr*, 98 F.2d 973, 975 (10th Cir. 1938); *McDougald v. Jenson*, 786 F.2d 1465, 1481 (11th Cir. 1986).

This can be seen in the wide variety of factors a court may take into consideration, such as the convenience of the parties and judicial efficiency, which were rejected by the district court. *Mission Ins. Co. v. Puritan Fashions Corp.*, 706 F.2d 599, 601 (5th Cir. 1983).

Additionally, other circuits have expanded the rule further to state that the term 'actual controversy' in relation to the

Declaratory Judgment Act should be liberally construed. *Dewey & Almy Chemical Co. v. American Anode*, 137 F.2d 68 (3rd Cir. 1943).

> [T]wo principal criteria guiding the policy in favor of rendering declaratory judgments are (1) when a judgment will serve a useful purpose in clarifying and settling the legal relations in issue, and (2) when it will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding.

Grand Trunk Western R. Co. v. Consolidated Rail Corp., 746 F.2d 323, 326 (6th Cir. 1984); *see also Travelers Ins. Co. v. Davis*, 490 F.2d 536, 543 (3rd Cir. 1974) ("to avoid accrual of avoidable damages to one not certain of his rights and to afford him an early adjudication without waiting until his adversary should *see* fit to begin suit, after damage had accrued" (footnote omitted); *see also Oce-Office Systems, Inc. v. Eastman Kodak Co.*, 805 F.Supp. 642, 646 (N.D.Ill. 1992) ("Resolving the uncertainty and anxiety resulting from a looming lawsuit is, indeed, the purpose of the Declaratory Judgment Act.").

The County argued that the documentation submitted in the district court satisfied the guidelines established by these cases. The district court disagreed.

2. *Mille Lacs Band of Chippewa Indians v. State of Minnesota*, 989 F.2d 994 (8th Cir. 1993) (standing).

The district court held that Mille Lacs County did not establish standing in the instant case. In a previous treaty related action initiated by the Mille Lacs Band, the Eighth Circuit Court of Appeals addressed the intervention interests of Mille Lacs County and other counties with territory subject to tribal claims. *Mille Lacs Band of Chippewa Indians v. State of Minnesota*, 989 F.2d 994 (8th Cir. 1993). *See also Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999).

Both the *counties* and the landowners *easily* satisfy two of the requirements for intervention as of right. First, both groups have interests in land in the ceded territory. The litigation between the Band and the State of Minnesota will determine Band members' rights to hunt, fish, and gather on land throughout the ceded territory, *including land the counties* and the landowners *own*. The result of the litigation also *may affect the proposed intervenors' property values* [counties and landowners]. *See id.* (holding that proposed intervenors' interests in protecting their property values are protectable interests). *The parties thus have recognized interests in the subject matter of the litigation.* Second, a judgment or settlement favorable to the Band may impair those interests, since it may permit Band members to exercise treaty rights upon the *proposed intervenors' land.* Even if the Band's rights under the 1837 treaty are limited to public land, a resulting depletion in fish and game stocks *may reduce the proposed intervenors' property values. See id.* ("[i]n order to prevent what they view as an incipient erosion of their property values, the applicants *must* participate in this litigation").

. . . The *counties* own certain land outright, and they have a beneficial interest in tax-forfeited land that they manage, derive revenue from, and sell. Any recognition of treaty rights would allow Band members to hunt and fish on public *county* land. The *counties* assert that such recognition would also affect the value of the property that they own and their ability to manage profitably and to derive revenue from tax-forfeited land. The *counties'* interests in land are narrower interests not subsumed in the general interest Minnesota asserts in protecting fish and game.

Because the *counties* and the landowners seek to protect local and individual interests not shared by the general citizenry of Minnesota, no presumption of adequate representation arises. . . . *[C]ounties* and the

> landowners will be more concerned with ensuring that any settlement does not impair their property values. A potential conflict of this sort is sufficient to satisfy the proposed intervenors' minimal burden of showing that representation of their interests by the exiting parties may be inadequate. . . .
>
> . . . The parties appear to agree that the *counties* own the entire beneficial interest in tax-forfeited land, ... [W]e presume that the state, unlike the landowners and, in many cases, the *counties* too, has little interest in the current market value of its lands. Different owners of different pieces of land used for different purposes may have dramatically different interests to protect. The interests that the counties and the landowners assert in their property are different. . .

Mille Lacs Band of Indians, 989 F.2d at 997-998, 1000-1002 (emphasis added).

In this light, the exchange in the oral argument in the district court, directed to the real estate interests of the County specifically referenced in the 1993 *Mille Lacs* case, should also be noted:

> MR. TOBIN: . . . There are other factors such as you discussed a few minutes ago that are also of concern to the county such *as depressed real estate values, since the court recognized in the Mille Lacs case the county owns land and has other interests there as well.* . . .

Transcript of Proceedings at 27, *County of Mille Lacs v. Benjamin, et al.*, 262 F.Supp.2d 990 (D.Minn. 2003) (emphasis added) (Co. Pet. App. 68a). At the time, the district court did not express an interest in this County real estate argument. *See* Transcript, Co. Pet. App. 68a-69a.[2]

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[2] The requirement of the State of Minnesota that this lawsuit regarding reservation status claim be disclosed in real property transactions should have been significant. Co. Pet. App. 201a-205a; 206a-207a; 208a-209a. The disclosure requirements in the Minnesota Rules expressly provide

Mille Lacs Band of Chippewa Indians v. State of Minnesota, 989 F.2d 994 (8th Cir. 1993), should have authoritatively resolved any doubts regarding the standing of the County. In the district court opinion, the district court overlooked this 1993 Mille Lacs case decided by the Eighth Circuit specifically addressing the interests of Mille Lacs County. In this 1993 litigation, the Eighth Circuit Court of Appeals *granted* intervention to Mille Lacs County. In terms of dollars and consequences, what was at stake in the 1993 treaty related litigation pales in comparison with the consequences of resurrecting the 61,000-acre Mille Lacs Reservation in this rural Minnesota county.

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that in order for any fact to be "material" it must be one that can "adversely" and "significantly" affect an ordinary purchaser's "*use*" or "*enjoyment*" *of property*. *Id.* (emphasis added). This lawsuit seeks to establish that none of the property within Mille Lacs County is within the 1855 Mille Lacs Reservation because that reservation has been disestablished.

As a result, the only material fact that could "adversely" and "significantly" affect property interests in this respect is reservation status, and any claim regarding reservation status lies squarely at the doorstep of the Band. In this respect, as in every other respect, the uncertainty surrounding reservation status has been directly *caused* by the formal actions of the Mille Lacs Band in claiming the 1855 Reservation boundaries.

The coverage of the disclosure issue in the local newspaper, the "Mille Lacs Messenger," confirms the substance of this argument.

> [S]ome real estate agents have said they fear *dooming lucrative deals*.
>
> That agent, who requested anonymity, wrote that potential buyers are asking "about *taxing and permitting power* that the (Mille Lacs Band of Ojibwe) would possibly have in an expanded reservation. . .
>
> Real estate agents are *loathe to discuss what the reservation boundaries might mean*. . .

Co. Pet. App. 201a-203a (emphasis added). The claim of the Band to 1855 Reservation status is the proximate cause of the very real problems documented in this case.

Although the district court noted in note 5 that "Article III standing is a prerequisite to intervention," *County of Mille Lacs*, 262 F.Supp.2d at 994-95 n.5; citing *Standard Heating & Air Conditioning Co. v. City of Minneapolis*, 137 F.3d 567 (8th Cir. 1998); *see also Mausolf v. Babbitt*, 85 F.3d 1295, 1299-1301 (8th Cir. 1996), the district court failed to note that the County had previously been granted intervention in the 1993 *Mille Lacs* case.

In this light, the district court should have recognized that Mille Lacs County (as well as the First National Bank of Milaca) satisfied the Article III standing requirement in this reservation boundary case. The district court did not address the issue even though the Eighth Circuit Court of Appeals was clearly not mistaken in granting intervention as a matter of right to Mille Lacs County in 1993. *Mille Lacs Band of Chippewa Indians v. State of Minnesota*, 989 F.2d 994 (8th Cir. 1993).

3. *Rosebud Sioux Tribe v. Kneip*, 375 F.Supp. 1065 (D.S.D. 1974), *aff'd*, 521 F.2d 87 (8th Cir. 1975), *aff'd*, 430 U.S. 584 (1977).

In *Rosebud Sioux Tribe*, this Court established that the uncertainty caused by this type of reservation boundary controversy is exactly the kind of "actual controversy" which the Declaratory Judgment Act was intended to remedy. The decision of this Court in *Rosebud Sioux Tribe* should have been instructive. Nevertheless, the district court decided this standing issue in this case in a way that conflicts with the substance of that relevant decision.

In *Rosebud Sioux Tribe*, the disagreement regarding the status of reservation boundaries was the only underlying controversy in the pleadings and the opinions. The dispute specifically focused *only* on the status of the reservation boundaries.

The County relied on this aspect of *Rosebud Sioux Tribe* in structuring its Complaint in the instant case. Accordingly, the dispute here also focuses on a legitimate and concrete disagreement regarding the status of reservation boundaries between the County and the Mille Lacs Band. In the Complaint the County specifically set forth the treaties and acts of Congress that the County maintains disestablished the Mille Lacs Reservation, as well as the precedent that confirmed that understanding. *See United States v. Mille Lac Band of Chippewa Indians*, 229 U.S. 498 (1913), Co. Pet. App. 31a-42a.

In Defendants' Answer, Affirmative Defenses and Request for Relief 212, § 15, the Band denied that the reservation had been disestablished. Co. Pet. App. 212a, ¶ 15. The Band claimed that for years, the Mille Lacs Band had formally maintained that the Reservation, established in 1855, continued to exist, although the Band could not cite a single case that recognized the continuing existence of the 1855 Mille Lacs Reservation.[3] As a result, the controversy regarding the effects of these treaties and acts on the status of the 1855 Reservation was formally put at issue in the instant case.

In the same manner, a similar controversy was formally confirmed in *Rosebud Sioux Tribe*. This was the County's primary argument. In opposing the Mille Lacs Band's Motion for Summary Judgment, the County devoted six pages of its brief to this argument and this and other similar reservation status declaratory judgment cases. Plaintiff County of Mille Lacs' Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment (Non-Merits Defenses), at 6-10, *County of Mille Lacs v. Benjamin, et al.*, 262

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[3] The Band did persuade an attorney in the field solicitor's office of the Department of the Interior to conclude that the 1855 Mille Lacs Reservation continued to exist, and the Environmental Protection Agency has relied on that conclusion. EPA, Co. Pet. App. 185a.

F.Supp.2d 990 (D.Minn. 2003). In addition, where necessary, this argument was appropriately supported by affidavits, depositions and documentary evidence. Index to Exhibits, Co. Pet. App. 167a-170a; *see also* Affidavits at Add. 18-24 and App. at 145-148, 149-151, 360-419, 420-421, 422-423, 424-425, 426, 436-437, 438-439, 484-485, 486-487.

The crux of the district court opinion centers around the one paragraph in the Order that the district court did devote to the *Rosebud Sioux Tribe* argument. The district court discounted the significance of this declaratory judgment reservation status precedent. *County of Mille Lacs*, 262 F.Supp.2d at 1000, Co. Pet. App. 17a. In *Rosebud Sioux Tribe* it was not *necessary* to focus on any controversy beyond the legitimate and concrete dispute among governmental entities regarding the status of reservation boundaries. Instead, the district court here pointed out unimportant differences in the general facts and steadfastly refused to otherwise squarely address this analysis or follow the path marked by *Rosebud Sioux Tribe* and other significant cases. In the process, the district court continued to insist upon a more specific controversy underlying the reservation boundary disagreement.[4] The district court rejected the *Rosebud Sioux Tribe* argument. The district court also found that the claims of the County were not ripe for adjudication.

4. Dismissal with Prejudice.

Without any further explanation, the district court also inexplicably ordered that the Complaint in this declaratory

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[4] In the initial phases of the *Oneida* litigation, a district court in *Oneida* rejected a similar lack of "actual controversy" dismissal argument. ("*The uncertainty as to these issues has significant real effects* on the State, the counties affected, and the landowners in these areas"). *Oneida Indian Nation of New York v. New York*, 194 F.Supp.2d 104, 138 (N.D.N.Y. 2002) *Oneida Indian Nation of New York v. City of Sherrill, New York* 337 F.3d 139 (2nd Cir. (N.Y.) 2003), *cert. granted*, 124 S. Ct. 2904 (U.S. 2004).

judgment be dismissed with prejudice. The County of Mille Lacs and First National Bank of Milaca appealed. The County requested that the oral argument be expedited.

C. Eighth Circuit Court of Appeals.

On appeal, the County maintained that this case is clearly fit for declaratory relief—even without a specific controversy underlying the dispute over the existence of reservation boundaries. And this submission is primarily founded upon the *Rosebud Sioux Tribe* precedent in this Court. The Court of Appeals rejected the argument without any substantive analysis. *The opinion of the Eighth Circuit Court of Appeals does not mention Rosebud Sioux Tribe.*

As an alternative argument, the County also pointed out (as it did in the district court) the evidence of specific controversies underlying the dispute over the existence of reservation boundaries submitted in the district court. Index to Exhibits, Co. Pet. App. 167a-170a; *see also* Affidavits at Add. 18-24 and App. at 145-148, 149-151, 360-419, 420-421, 422-423, 424-425, 426, 436-437, 438-439, 484-485, 486-487. This argument was also set forth in the Complaint. Co. Pet. App. 102a-160a.

The Eighth Circuit Court of Appeals did not accept the County's argument or evidence. The Eighth Circuit Court of Appeals concluded that the County was unable to demonstrate standing, and because there was no actual "case or controversy" before the court, the ripeness issue was moot.

Although the Eighth Circuit Court of Appeals affirmed the district court's dismissal for lack of standing, it reversed the district court's inexplicable decision to dismiss the Complaint with prejudice, as premature. The Eighth Circuit Court of Appeals simply noted that under Fed.R.Civ.P. 41(b), dismissing for lack of jurisdiction is not an adjudication on the merits, as the court had repeatedly explained in a number of recent cases. *County of Mille Lacs v. Benjamin, et al.*, 361 F.3d 460, 464-465 (8th Cir. 2004). Co. Pet. App. 25a-26a.

REASONS FOR GRANTING THE PETITION

In *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977), the Rosebud Sioux Tribe filed a straightforward declaratory judgment action against a number of South Dakota counties to clarify the effect of acts of Congress on reservation boundaries. Ultimately, this Court decided the issue in an opinion that set forth the history of the legislation in great detail. The majority and dissenting opinions also addressed every argument of substance submitted by the parties and *amici curiae*, including the United States.

In the instant case, the County relied on the decision of the Court in *Rosebud Sioux Tribe* and structured its complaint to conform to the complaint in *Rosebud Sioux Tribe*. Here, as in *Rosebud Sioux Tribe*, the County did not primarily rely upon any specific controversy underlying the Mille Lacs boundary dispute. Here, as in *Rosebud Sioux Tribe*, the County reasoned that a legitimate conflict among governments concerning the effect of treaties or acts of Congress on this 1855 Indian reservation, supported by statutory enactments, was clearly sufficient to establish necessary standing, ripeness and justiciability.

The Mille Lacs Band addressed the County's *Rosebud Sioux Tribe* argument in a couple of sentences by noting that *Rosebud Sioux Tribe* did "not even address Article III standing." Defendants' Reply Memorandum of Law in Support of Motion for Summary Judgment (Non-Merits Defenses) at 1, n.2, *County of Mille Lacs v. Benjamin, et al.*, 262 F.Supp.2d 990 (D.Minn. 2003). The district court skirted the *Rosebud Sioux Tribe* standing issue and made a cursory reference to ripeness. Co. Pet. App. 17a-18a.

The Eighth Circuit Court of Appeals did not mention *Rosebud Sioux Tribe*, affirmed the district court on the standing issue and concluded that the ripeness issue was moot. *County of Mille Lacs*, 361 F.3d 460 (8th Cir. 2004), Co. Pet.

App. 20a-26a. As a result, the Eighth Circuit Court of Appeals did not even discuss the fact that it would have been obligatory for the courts in *Rosebud Sioux Tribe*, including this Court, to have raised standing or any similar Article III issue, even if the parties failed to do so. This Court has repeatedly made this observation in a number of cases.

1. In 1972, the Court summarized the role of parties and the courts in this respect:

> Since the parties may *not* confer jurisdiction either upon this Court or the District Court by stipulation, the request of both parties in this case that the court below adjudicate the merits of the constitutional claim does *not* foreclose *our* inquiry into the existence of an "actual controversy" within the meaning of 28 U.S.C. 2201 and Art. III, 2, cl. 1, of the Constitution.

California v. LaRue, 409 U.S. 109, 113 n. 3 (1972) (emphasis added). *See also Hodel v. Irving*, 481 U.S. 704 (1987):

As the Court of Appeals recognized, however, the existence of a case or controversy is a jurisdictional prerequisite to a federal court's deliberations. *Id.*, at 1267, n. 12. We are satisfied that the necessary case or controversy exists in this case.

Id. at 711.

And most recently, the Court noted the sweep of this doctrine:

> [I]t deprived the federal court of its requisite subject-matter jurisdiction. Such an error may be raised by a party, and indeed *must* be noticed *sua sponte* by a court, at *all points in the litigation*. . . . [S]uch a jurisdictional defect deprives not only the initial court but also the appellate court of its power over the case or controversy. . .

Freytag v. Comm'r of Internal Revenue, 501 U.S. 868, 896 (1991) Scalia J. dissenting (emphasis added).

2. The Eighth Circuit Court of Appeals should have addressed this overriding issue. In other cases decided in the Eighth Circuit, the Court of Appeals has succinctly made similar points. For example, *see*: "It is *axiomatic* that a 'case' or 'controversy' *must* exist at *all* stages of the litigation and not merely at the time the complaint is filed." *Allen v. Likins*, 517 F.2d 532, 534 (8th Cir. 1975) (emphasis added); "[W]e rest our decision upon the ripeness doctrine, which we may raise *sua sponte* at any stage in the proceedings. . ." *Bergstrom v. Bergstrom*, 623 F.2d 517, 519 (8th Cir. 1980).

And the Ninth Circuit has said the same thing: "*All* will agree that federal courts may act *only* in the context of a justiciable case or controversy. . . . Our *duty*, therefore, is to resolve whether there is a substantial controversy . . . " *Rincon Band of Mission Indian v. County of San Diego*, 495 F.2d 1, 4 (1974). Also *see*

> It is hornbook law that jurisdiction of a District Court cannot be stipulated to by the parties, and that the court *sua sponte* must satisfy itself that jurisdiction exists.

Id. at 8, Browning, J. dissenting.

In this light, the district court and the Eighth Circuit Court of Appeals could not assume that this Court, (and the district court and the court of appeals in *Rosebud Sioux Tribe*) missed its usual way in *Rosebud Sioux Tribe* and missed this jurisdictional prerequisite.

I. THE EIGHTH CIRCUIT COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION IN A WAY THAT CONFLICTS WITH THE RELEVANT DECISION OF THIS COURT IN *ROSEBUD SIOUX TRIBE V. KNEIP*, 430 U.S. 584 (1977).

A. The Pleadings in the Instant Case Track the Pleadings in *Rosebud Sioux Tribe*. (*Rosebud Sioux Tribe v. Kneip*, 375 F.Supp. 1065 (D.S.D. 1974), *aff'd*, 521 F.2d 87 (8th Cir. 1975), *aff'd*, 430 U.S. 584 (1977).)

In this pertinent case, the 1972 path marking action of *Rosebud Sioux Tribe v. Kneip*, 375 F.Supp. 1065 (D.S.D. 1974), the roles of the parties were reversed, but the general request for a declaratory judgment was identical to the request in the complaint filed by the County in the instant case. In *Rosebud Sioux Tribe*, the Rosebud Sioux Tribe filed:

> [A] declaratory judgment action pursuant to 28 U.S.C. § 2201 *et seq.* seeking declarations that three specific acts of Congress did not diminish the Rosebud Sioux Reservation or alter its boundaries from those defined in the act of March 2, 1889 . . . *plaintiff does not seek a declaration of the exact nature of the jurisdiction, or the exact rights and privileges that members of the Rosebud Sioux Tribe enjoy in the four counties in question.* The plaintiffs do ask this Court to declare whether or not any of the three statutes in question operated to diminish the geographical territory over which the tribe is entitled to exercise jurisdiction.

Id. at 1066 (emphasis added).

As the *Rosebud Sioux Tribe* district court noted, the pleadings in *Rosebud Sioux Tribe* were straightforward declaratory judgment pleadings. The Amended Complaint in *Rosebud Sioux Tribe* simply sets forth the congressional acts at issue. Co. Pet. App. 164a-165a. It then notes that the state and counties did not recognize the areas affected by the acts as "Indian Country," contrary to the Tribe's claim that none of the acts reduced the Rosebud Reservation. Co. Pet. App. 165a. The Amended Complaint concludes with a prayer that the court declare that the areas at issue remain "Indian Country." Co. Pet. App. 166a.

The answer of the defendants in *Rosebud Sioux Tribe* squarely denied that the acts at issue in *Rosebud Sioux Tribe* had not altered the status of the Rosebud Reservation boundaries. With reference to each *Rosebud* act, the answer of the county defendants in *Rosebud Sioux Tribe*, asserted that the Act diminished the reservation and that "the same was no longer Indian Reservation and/or Country, except as to individual Indian Allotted lands."

In the answer of the state defendants, the State addressed all three Rosebud acts in one paragraph and asserted that everyone considered that the legislation removed such disputed area from the boundaries of the Rosebud Sioux Indian Reservation.

The district court in *Rosebud Sioux Tribe* held that the Acts disestablished part of the Rosebud Reservation and the Eighth Circuit Court of Appeals confirmed that the Acts disestablished portions of the Rosebud Reservation. *Rosebud Sioux Tribe*, 375 F.Supp. 1065 (D.S.D. 1974), *aff'd*, 521 F.2d 87, 88 (8th Cir. 1975). The Eighth Circuit Court of Appeals was in turn affirmed by this Court.

The opinion of the Court in *Rosebud Sioux Tribe* succinctly stated:

> In June 1972, the Rosebud Sioux Tribe sued in the United States District Court for the District of South Dakota to obtain *a declaratory judgment that the original boundaries of their reservation, as defined in the Act of March 2, 1889, 25 Stat. 888, had not been diminished by three subsequent Acts of Congress* . . .
>
> * * * *
>
> The intent of Congress . . . was to change the boundaries of the original 1889 Rosebud Reservation.

Rosebud Sioux Tribe, 430 U.S. at 585, 615. Further, the Court in *Rosebud Sioux Tribe* expressly complimented the Eighth Circuit Court of Appeals on a "careful and comprehensive opinion." *Id.* at 585.

As noted above, the Answer in this *Mille Lacs* case maintains that the treaties and acts at issue here did not alter the status of the 1855 Mille Lacs Reservation boundaries. Defendants' Answer, Affirmative Defenses and Request for Relief, Co. Pet. App. 210a-214a, 212a.. Band statutes, ordinances and other legislative enactments explicitly support this claim, Co. Pet. App. 53a-60a. The depositions of the Band unequivocally confirm this same claim.

As a result, in both cases, the controversy regarding reservation boundaries is substantial and legitimate. It is also clearly identified in the complaint and answer, formally documented in the actions of both parties and the evidence in this case.[5] *Rosebud Sioux Tribe* is controlling precedent, with pleadings indistinguishable from the pleadings filed in the instant case, as the pleadings attest. Co. Pet. App. 102a-160a; 161a-166a.

B. *Rosebud Sioux Tribe* did not Focus on Any Controversy Beyond the Legitimate and Concrete Dispute among Governmental Entities Regarding the Status of Reservation Boundaries.

1. The district court should have viewed and analyzed the issue presented in the context of *Rosebud Sioux Tribe*. Instead, at oral argument, the district court was not interested in any argument that focused on the significance of *Rosebud Sioux Tribe* or any of this. Rather, the district court repeat-

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[5] In addition, the Mille Lacs Band still maintains that it has jurisdiction over all Mille Lacs Band members on all Band-owned land within the 1855 Reservation. Statutes of the Mille Lacs Band have been passed to enforce this claim. The Mille Lacs Band cannot deny that it continues to enforce this claim and that the Mille Lacs Band owns *fee* land. In the absence of the 1855 Reservation boundaries, the Mille Lacs Band could not have jurisdiction over Band members on this *fee* land or any fee land. Moreover, administrative actions of the Mille Lacs Band regarding 1855 Reservation boundaries support this continuing enforcement.

edly insisted that the argument be directed to a subject that was not a consideration in *Rosebud Sioux Tribe*. Namely, the necessity of identifying some specific *underlying* dispute or injury in addition to the acknowledged controversy regarding reservation boundaries—in the words of the district court "a concrete problem." Transcript, Co. Pet. App. 62a.

THE COURT: What's your problem?

MR. TOBIN: Well, we maintain that in accordance with how we read Supreme Court precedent that this reservation has been disestablished.

THE COURT: That's not the question I asked. I said what's your problem?

MR. TOBIN: That, ah—

THE COURT: What is the concrete problem that Mille Lacs County's got that makes them have to do something? Which makes me have to do something?

MR. TOBIN: We maintain that the band's statutes and the refusal to disavow the reservation boundaries have created a case or controversy within the meaning of *New Town* and within the meaning of *Rosemount* [*Rosebud*] . . .

MR. TOBIN: I guess my response here, Your Honor, is our problem is identical to the problem in *New Town*, and identical to the problem in *Rosemount* [*Rosebud*].

THE COURT: What happened in *New Town*?

MR. TOBIN: In *New Town* the city brought a Declaratory Judgment Act, as we have, and they said in that action that different people are taking actions, generally speaking, that are dependent upon reservation boundaries that we say do not exist and therefore we would like a declaratory judgment that would be addressed to those acts of Congress that we maintain disestablished the reservation. The same thing happened, only the flip side of the coin in Rosebud Sioux

Tribe. In *Rosebud*, the court said—excuse me. In *Rosebud*, the Rosebud Sioux Tribe sued four counties.

THE COURT: But that was where the moving party was the bands.

MR. TOBIN: The mutuality that the bands referred to, that's correct.

THE COURT: Yup, okay. That's not what happened here.

MR. TOBIN: Not in this instance, no. But it's the flip side of *New Town*.

THE COURT: There's a big difference about who's surrendering to what jurisdiction and who's the moving party.

MR. TOBIN: In our, ah, in our opinion the pleadings are identical in both respects as they are in this particular case.

THE COURT: Okay.

MR. TOBIN: Ah, why—could I ask the Court why the Court is concerned that we make a difference whether the band would be bringing the suit or whether the county would be bringing the suit?

THE COURT: Well, the band bringing the suit would have a certainly an interesting aspect in terms of its sovereign immunity. Because it would have surrendered its immunity by bringing the suit.

MR. TOBIN: That would get to that third question on sovereign immunity. We believe we get to that in any event.

THE COURT: I know what your belief is, but I'm saying seems to me there's quite a bit of difference between them bringing the action and them getting hauled in.

MR. TOBIN: At base, Your Honor, we believe we're on all fours with both those cases. Clear to the United States Supreme Court. . . .

Transcript, Co. Pet. App. 62a, 64a-65a.

At base, the sovereign immunity issue was just one in a blizzard of defenses raised by the Band, including the lack of a federal question, that were without merit and arguably

frivolous. *See Mille Lacs Band of Chippewa Indians v. Minnesota*, 124 F.3d 904, 914 (8th Cir. 1997); *Fond du Lac Band of Chippewa Indians v. Carlson*, 68 F.3d 253, 257 (8th Cir. 1995). *Rosebud Sioux Tribe* should have been controlling in this case.

II. THE MILLE LAC BAND'S IMPORTANT CLAIM THAT THE 1855 RESERVATION EXISTS CONFLICTS WITH THE RELEVANT DECISION OF THIS COURT IN *UNITED STATES V. MILLE LAC BAND OF CHIPPEWA INDIANS*, 229 U.S. 498 (1913).

> The gap is widening, I fear, between solid historical accounts and the pseudohistorical or mythical accounts adopted and proclaimed by many Indians and their white advocates.

Francis Paul Prucha, "The Challenge of Indian History," The Western Forum (January, 1995).

Documentation submitted in this Court in *United States v. Mille Lac Band of Chippewa Indians*, 229 U.S. 498 (1913) establishes the legitimate history of the 1855 Mille Lacs Reservation, Co,. Pet. App. F, 31a-42a; Co. Pet. App. J, 102a-160a The Band's position on the merits in the instant case that the reservation still exists is not persuasive. The perspective from which this Court should view the reservation status issue is readily established by reference to the 1913 Mille Lacs documentation. *Id.*

The opinion of the Court and related documentation in *Mille Lacs* unequivocally establish the legitimate history of this 1855 Reservation. In the district court, the County brought this documentation to the attention of the court as Exhibit 1 to the Complaint in this action. *See* Co. Pet. App. J, 130a-152a. Exhibit 1 sets forth twenty-two (22) pages of excerpts from the 1913 *Mille Lacs* case that establishes the proper historical prospective. *Id.* Several examples of those representative excerpts include:

I. *Mille Lac Band of Chippewas v. United States*, 47 Ct. Cl. 415 (1912)

A. Brief of Claimant [Mille Lac Band], *Mille Lac Band of Chippewa Indians v. United States* (No. 30447)

2. [T]hat the United States, through the Interior Department, refused to permit any Mille Lac Indian to take allotment on such reservation; . . . *such reservation was extinguished as an Indian reservation*; all the rights of the Mille Lacs in and to such reservation were denied;. . . *the Mille Lacs were deprived of their reservation as a home and for every purpose whatever. Id.* at 433 (emphasis added).

5. Has the claimant done anything since December 20, 1893, to bar or mitigate their *right or claim against the United States Government for taking from such band the Mille Lac reservation*, *Id.* at 435 (emphasis added).

14. Such Indian title to the Mille Lac Reservation remained in the Mille Lac band *until their cession and relinquishment of such reservation to the United States, October 5, 1889. Id.* at 451-452 (emphasis added).

15. Ought the Government to pay for *the Reservation so taken*? *Id.* at 462 (emphasis added).

16. As has been shown, the purpose of that act was to *take this Mille Lac Reservation* . . . *Id.* at 462 (emphasis added).

17. The land was taken by others with the consent of the Government, the *Mille Lacs lost their reservation. Id.* at 462 (emphasis added).

19. It is claimed [by Plaintiff] that the passage of the joint resolution of December 19, 1893, which legalized these otherwise void entries on the Mille Lac reservation, *extinguished the Mille Lac reservation, took the entire reservation away from the Mille Lac*

Indians because it was no longer an Indian reservation. *Id.* at 466 (emphasis added).

21. So while *it is admitted that Congress had the power and did legally extinguish the Mille Lac reservation . . .* *Id.* at 467 (emphasis added).

25. The measure of damages for the *taking of such reservation . . .* *Id.* at 471 (emphasis added).

27. *[A]s the reservation was taken from the Mille Lacs . . . they were entitled to the reasonable value of the reservation at that time.* *Id.* at 471 (emphasis added).

28. So the measure of damages would be *the reasonable value at the date when the reservation was extinguished.* *Id.* at 471 (emphasis added).

34. The United States . . . *finally extinguished the reservation, took the entire reservation away from the Mille Lacs.* *Id.* at 481 (emphasis added).

41. [T]*he Mille Lac band have been deprived of their rights and interests in and to the Mille Lac Reservation . . .* *Id.* at 504 (emphasis added).

42. [H]ave been *deprived* of all the pine lands in the said Mille Lac Reservation, and *all of the land comprising such Mille Lac Reservation, and all of their right, title and interest in and to such reservation.* *Id.* at 505 (emphasis added).

B. Defendants' Brief [United States] in Support of Motion for a New Trial, and Request for Amended Findings

8. [T]he right of occupancy of the former Mille Lac Reservation under article 12 of the treaty of May 7, 1864, was *relinquished* by the Mille Lac Band. *Id.* at 27. (emphasis added).

13. These two officials held a number of councils with the Mille Lac Indians on the *former* Mille Lac Reservation, who numbered 75 adults living around the shores of Mille Lac. (Rec., pp. 122-157.) It

was thoroughly explained to the Indians that they had already parted with all their rights on the *former* Mille Lac Reservation. *Id.* at 32 (emphasis added).

15. On August 30, 1902, an agreement was accordingly entered into between the United States and the Mille Lac Chippewas residing on the *former* Mille Lac Reservation, by which they agreed to remove therefrom upon the payment of the $40,000 appropriated . . . *Id.* at 33 (emphasis added).

II. *United States v. Mille Lac Band of Chippewa*, 229 U.S. 498 (1913)

A. Brief for the Appellee, Mille Lacs Band

1. The *relinquishment of the Mille Lac Reservation* was obtained from the Mille Lacs with the understanding and belief on their part that. . . . *Id.* (emphasis added).

2. [T]he cession and relinquishment of the Mille Lacs Band of Chippewas of Mississippi and its *relinquishment of the Mille Lac Reservation* . . . . *Id.* at III (emphasis added).

3. [W]hich reservation was reserved to the Mille Lac Band of Indians under the treaties of 1863 and 1864, and *relinquished by it* to the United States, under the act of January 14, 1889, to be sold as provided . . . . *Id.* at 2 (emphasis added).

4. [D]id *forever relinquish* to the United States their right of occupancy on the Mille Lac Reservation reserved to them by the treaty of March 11, 1863, and May 7, 1864, . . . *Id.* at 5 (emphasis added).

5. [T]he United States, through the Interior Department, refused to permit the Mille Lac Indians to take allotment on such Reservation; the entire reservation was opened to public settlement, *such reservation was extinguished as an Indian Reservation*; *all*

the rights of the Mille Lacs in and to such Reservation were denied; . . . *Id.* at 7 (emphasis added).

8. The contention of appellee [Mille Lacs Band] is:

> The Mille Lac band, *the claimant, had a reservation, the Mille Lac Reservation; that claimant relinquished such reservation* to the United States . . . *Id.* at 25 (emphasis added).

11. Surely, the Indian title to the Mille Lac reservation was in them, remained in them *until they parted with it by cession and relinquishment. Id.* at 36 (emphasis added).

13. The Instrument of relinquishment by which the Mille *Lac band relinquished to the United States their right of occupancy to the Mille Lac Reservation* . . . *Id.* at 41 (emphasis added).

16. THE CESSION AND RELINQUISHMENT BY THE MILLE LACS BAND OF CHIPPEWAS . . . AND *ITS RELINQUISHMENT OF THE MILLE LAC RESERVATION* . . . *Id.* at 60 (emphasis added).

19. [T]he Mille Lac band *finally relinquished to the United States the Mille Lac Reservation*, . . . *Id.* at 88 (emphasis added).

B. Brief for the United States, *United States v. Mille Lac Band of Chippewa*, 229 U.S. 498 (1913) (No.736)

1. By article 1 of this [1864] treaty the Mississippi Bands *ceded absolutely* to the United States the six tracts theretofore set apart for them. Brief for the United States, *United States v. Mille Lacs Band of Chippewa*, 229 U.S. 498 (1913) (No.736) at 6 (emphasis added).

2. Between 1870 and 1884 nine-tenths of the Mille Lac Reservation was settled upon or preempted by the whites. *Id.* at 10.

6. [A]nother letter of Secretary Teller, dated February 13, 1883, to the Commissioner of the Land Office,

stating that he had previously *held that there was no reservation*, and that the Mille Lac land was public land . . . *Id.* (emphasis added).

9. [T]he Mille Lacs Band, under the provisions of the act of January 14, 1889, . . . *relinquished* their right of occupancy of the Mille Lac Reservation, reserved by article 12 of the treaty of May 7, 1864, *supra*. *Id.* (emphasis added).

13. In the Indian appropriation act of May 27, 1902. . . 'For payment to the Indians occupying the Mille Lac Reservation, . . . the sum of forty thousand dollars, . . . to pay said Indians for improvements made by them, . . . upon *condition of said Indians removing* from said Mille Lac Reservation... *Id.* at 26 (emphasis added).

For the convenience of the Court, other excerpts are set forth in Co. Pet. App. 130a-152a.

Significantly, in the Eighth Circuit Court of Appeals the Band not only neglected to address any of this history, it also failed to set forth or even reference *a single sentence* from this 1913 Mille Lacs documentation in its "Statement of Facts" to support the claim that the 1855 Mille Lacs Reservation still exists.

CONCLUSION

The decision of the Eighth Circuit Court of Appeals ignores the realities of the position of the County in this litigation. This County is a small rural county that can ill afford to litigate reservation status with the Mille Lacs Band ad infinitum (Band with tens of millions of dollars in casino profits).

In this case, in the months after the oral argument in the district court, discovery was completed and the County served its Motion for Summary Judgment on the merits, pursuant to the schedule previously set forth in the pretrial order. As a result, the issue is fit for judicial determination, which will largely, if not totally, settle the parties' dispute.

Through a judicial decision on this issue, both parties will know the limitations on their jurisdiction, and their ability to regulate activities and persons and to enforce their laws will be more clear.

For the foregoing reasons, in view of the conflict of the decision below with past decisions of this Court, the Court may wish to consider summary reversal. Alternatively, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT
D. MINNESOTA

No. 02-CV-407 JMRRLE

COUNTY OF MILLE LACS *et al.*

v.

MELANIE BENJAMIN *et al.*

May 6, 2003

ORDER

ROSENBAUM, *Chief Judge.*

Plaintiff County of Mille Lacs ("County"), and intervenor, First National Bank of Milaca,[1] ask the Court to declare the legal status of an Indian reservation.[2] The reservation was established by an 1855 treaty between the Mille Lacs Band of Chippewa Indians and the United States of America. Defendants are individual leaders of the Mille Lacs Band of Chippewa Indians. This matter is before the Court on defendants' motion for summary judgment.

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[1] The First National Bank of Milaca has intervened as a plaintiff. *See* Fed.R.Civ.P. 24(a)(2). For purposes of this motion, the Court will refer to the County and the Bank collectively as plaintiffs.

[2] Plaintiffs also ask the Court to strike defendants' supplemental exhibits and affidavits. Because these materials were not used by the Court in rendering its decision, plaintiffs' motion is moot.

I. *Background*

A brief history of the reservation provides a context for this dispute. In 1837, not far from Fort Snelling, Minnesota, the United States and 12 Chippewa Nation Bands negotiated a treaty under which the Chippewa Bands ceded title to certain upper midwest lands to the United States.

On February 22, 1855, the Minnesota Chippewa entered into another treaty, whereby six separate tracts of reservation land were established as a permanent home for the Minnesota Chippewa, including the Mille Lacs Band. The Mille Lacs Band encompassed some 61,000 acres around Kathio, South Harbor, and Isle Harbor townships in Minnesota (hereinafter "the 1855 reservation").

Two additional treaties, 12 Stat. 1249 (1863) and 13 Stat. 693 (1864),[3] are of interest. In 1863, and again in 1864, the Minnesota Chippewa entered into treaties ceding further lands to the United States. Article XII of both treaties provides, "that, owing to the heretofore good conduct of the Mille Lac [sic] Indians, they shall not be compelled to remove [from their reservation to White Earth] so long as they shall not in any way interfere with or in any manner molest the persons or property of the whites."

The treaty terms were not, however, always honored. As stated by the Court of Claims, "[t]he 1863 and 1864 treaties notwithstanding, between 1871 and 1889, 55,976.42 acres of the Mille Lac land were filed against under the public land laws, i.e., homestead and preemption entries were made on over ninety percent of it." *Minn. Chippewa Tribe v. United States*, 11 Cl.Ct. 221, 225 (1986). On July 4, 1884, to forestall this loss, Congress stayed any patenting or disposal of Mille Lacs land pending further legislation. *See* Ch. 180, 23 Stat.

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[3] The 1864 Treaty also earmarked specific tracts of land for Mille Lacs Band leadership.

76, 98 (1884). In 1889, not long thereafter, Congress passed the Nelson Act, which applied the policies of the General Allotment Act to the Chippewa Bands. The Nelson Act contained several provisions significantly different from the General Allotment Act. While the General Allotment Act provided individual members with certain proceeds from the sale of tribal land, the Nelson Act directed any profits derived from land sales into a collective permanent trust fund for the Minnesota Chippewa Band.

On February 15, 1909, Congress authorized the Court of Claims:

> to hear and determine a suit or suits to be brought by and on behalf of the Mille Lac [sic] Band of Chippewa Indians in the State of Minnesota against the United State [sic] on account of losses sustained by them or the Chippewas of Minnesota by reason of the opening of the Mille Lac [sic] Reservation . . . to public settlement under the general land laws of the United States.

35 Stat. 619, c. 126 (1909). The Mille Lacs Band filed suit pursuant to the 1909 Act to recover losses resulting from the 1889 Act. This suit was ultimately heard and resolved by the United States Supreme Court, which ordered an assessment of damages in favor of the Band. *See United States v. Mille Lac Band of Chippewa Indians*, 229 U.S. 498, 33 S.Ct. 811, 57 L.Ed. 1299 (1913). Shortly after this decision, the United States purchased land for the Mille Lacs Band and made allotments to it and its members. The 4,000 acres purchased at that time are held in trust, and are not disputed here.

In 1990, the Mille Lacs Band filed a lawsuit which casts its shadow over the present matter. By joining with several other Bands, they sought a declaratory judgment to establish entitlement to continued implied hunting and fishing rights originally guaranteed in the 1837 Treaty. Nine years later, the United States Supreme Court ruled in their favor, and in

Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 119 S.Ct. 1187, 143 L.Ed.2d 270 (1999), found that the 1837 Treaty protected the their hunting and fishing rights. Notwithstanding the finality of the Supreme Court's decision, there still remain a number of unresolved issues between the Mille Lacs Band and neighboring landowners.

It is also appropriate to recognize that, over the past few years, the Mille Lacs Band has opened two highly successful casinos, and has used revenues therefrom to acquire additional land. During this time, the Mille Lacs Band leaders have referred to a possible reassertion of their claim to land within the 1855 reservation boundaries. This claim has exacerbated relations between the Mille Lacs Band and its nearby neighbors, who brought this case. Plaintiffs ask the Court to declare that the Mille Lacs Band has no claim to any land beyond that which it occupies today.

II. *Discussion*

Defendants premise their motion to dismiss on four jurisdictional arguments. First, they claim plaintiffs lack standing to assert their claims. Second, they deny plaintiffs' claims are ripe for adjudication. Third, they claim sovereign immunity bars the action. Fourth, they claim plaintiffs' failure to join the United States in this action is a failure to join an indispensable party.[4]

Before addressing the merits of their motion, the Court must consider the posture of the motion. The First National Bank of Milaca argues that dismissal, not summary judgment, is the proper remedy for a non-justiciable suit. Pl. Opp'n Mem. at 8 (citing Fed.R.Civ.P. 12(b)). While the Court agrees that if plaintiffs lack standing dismissal is the proper remedy, it finds defendants have properly raised justiciability

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[4] The Court finds it lacks subject matter jurisdiction and declines to rule on the latter two arguments.

arguments through their summary judgment motion. *Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 329, 119 S.Ct. 765, 142 L.Ed.2d 797 (1999); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992).

Defendants are foreclosed from filing a motion to dismiss, having already interposed an answer. Fed.R.Civ.P. 12(b) ("A motion making any [12(b)] defenses shall be made before pleading if a further pleading is permitted."); *see also* 5A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1361 (Supp.2002) ("[M]otions raising [a lack of subject matter defense] may be considered by the court even when interposed after the responsive pleading has been filed, although technically [it is] no longer [a] Rule 12(b) motion[ ]."). Therefore, because a motion to dismiss is procedurally barred, the Court employs the traditional summary judgment analysis to evaluate standing.

Under this rubric, plaintiffs must establish a genuine issue of material fact as to justiciability in order to survive summary judgment. *Dep't of Commerce*, 525 U.S. at 329, 119 S.Ct. 765 ("To prevail on a . . . motion for summary judgment—as opposed to a motion to dismiss—[ ] mere allegations of injury are insufficient. Rather, a plaintiff must establish that there exists no genuine issue of material fact as to justiciability or the merits."); *Lujan*, 504 U.S. at 561, 112 S.Ct. 2130 ("Since [the elements of standing] are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation.") (citations omitted).

A. *Standing*

The question of standing "involves constitutional limitations of federal court jurisdiction." *Bennett v. Spear*, 520 U.S. 154, 162, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997) (quoting *Warth v. Seldin*, 422 U.S. 490, 498, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975)). "To satisfy the case or controversy requirement of Article III, which is the irreducible constitutional minimum of standing, a plaintiff must, generally speaking, demonstrate that he has suffered injury in fact, that the injury is fairly traceable to the actions of the defendant, and that the injury will likely be redressed by a favorable decision." *Id.* "In addition to constitutional requirements, standing also involves prudential limits on the exercise of federal jurisdiction." *Rosebud Sioux Tribe v. McDivitt*, 286 F.3d 1031, 1036 (8th Cir.2002) (citing *Bennett*, 520 U.S. at 162, 117 S.Ct. 1154).

Constitutional standing "assures that the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 472, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982). "Absent specific facts establishing distinct and palpable injuries fairly traceable to [the defendants' conduct]" the injury in fact requirement is not satisfied. *Ark. ACORN Fair Hous., Inc. v. Greystone Dev., Inc.*, 160 F.3d 433, 435 (8th Cir.1998). Therefore, absent an actual controversy, the Court lacks jurisdiction. *See Caldwell v. Gurley Ref. Co.*, 755 F.2d 645, 648 (8th Cir.1985).

1. *Law of the Case*

First National Bank of Milaca claims the Court's inquiry into its standing is foreclosed by Magistrate Judge Noel's Order allowing it to intervene. The Bank asserts the Mag-

istrate's ruling established the binding "law of the case."[5] The Bank is incorrect; its position misconstrues the "law of the case."

The Bank cites a number of cases, including *Klein v. Arkoma Prod. Co.*, 73 F.3d 779, 784 (8th Cir.1996), to support its position. *Klein*, however, refers not to a magistrate's ruling vis-a-vis the district court hearing the case, but rather to the precedential effect of an appellate court's decision on the lower court when the matter is remanded. This case is entirely different.

If the Bank's argument is correct, this Court could never alter a magistrate's decision, or indeed, one of its own. To the contrary, it is clear that a district court may correct itself to avoid later reversal when convinced a decision "is clearly erroneous and would work a manifest injustice." *Arizona v. California*, 460 U.S. 605, 618, 103 S.Ct. 1382, 75 L.Ed.2d 318 n. 8 (1983); *Lovett v. Gen. Motors Corp.*, 975 F.2d 518, 522 (8th Cir.1992); 28 U.S.C. § 636 (granting district court judge's authority to reverse erroneous magistrate orders). In *Lovett,* the Eighth Circuit Court of Appeals upheld a district court's reconsideration of its own standing decision. *See id.* Because the law of the case doctrine applies only to issues decided by final judgments, *id.,* the earlier decision did not bind the court. Here, the Magistrate did permit the Bank to intervene. But the law of the case does not bar this Court's consideration of the Bank's standing.

2. *Do Plaintiffs Have Standing?*

Constitutional standing requires that plaintiffs suffer some injury to justify the Court's entry of a declaratory judgment. Standing requires either actual or threatened injury. *Babbitt*,

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[5] Article III standing is a prerequisite to intervention. *Standard Heating & Air Conditioning Co. v. City of Minneapolis*, 137 F.3d 567, 570 (8th Cir.1998).

442 U.S. 289, 292, 99 S.Ct. 2301, 60 L.Ed.2d 895 (1979). "At the summary judgment stage the party invoking federal jurisdiction must have at least alleged specific facts that, taken as true, demonstrate the party suffered an injury in fact, that is one which is '(a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical.'" *Nat'l Fed'n for the Blind v. Cross*, 184 F.3d 973, 979 (8th Cir. 1999) (citing *Lujan*, 504 U.S. at 560-61, 112 S.Ct. 2130).

Plaintiffs' primary claim arises out of threatened regulation by Mille Lacs Band ordinances.[6] The Court finds this claimed injury does not meet the constitutional requirement for standing; it is not actual, concrete, or imminent.

While actual enforcement of regulatory ordinances is not required by law, standing requires more than an "imaginary or speculative" fear of prosecution. *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298, 99 S.Ct. 2301, 60 L.Ed.2d 895 (1979). An injury may involve past prosecution, *United Food & Commercial Workers Int'l Union v. IBP, Inc.*, 857 F.2d 422, 427 (8th Cir.1988), or the intent to engage in the exercise of a constitutionally guaranteed right, *Doe v. Bolton*, 410 U.S. 179, 188, 93 S.Ct. 739, 35 L.Ed.2d 201 (1973). *See also Stoianoff v. Montana*, 695 F.2d 1214 (9th Cir.1982) ("The mere existence of a statute, which may or may not ever be applied to plaintiffs, is not sufficient to create a controversy within the meaning of Article III."). In order to allege a cognizable injury, plaintiffs must demonstrate a realistic danger of enforcement by the Band.

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[6] *See, e.g.* 18 M.L.B.S.A. § 101 (requiring Band licensure to conduct business with the Band or within its jurisdiction); 24 M.L.B.S.A. §§ 3301-3309, 3501-3510 (setting debtor/creditor law); 11 M.L.B.S.A. § 9 (providing environmental protection regulations); 11 M.L.B.S.A. § 1002 (regulating waste disposal); 5 M.L.B.S.A. §§ 111(a)-(e), 113 (establishing general tribal court jurisdiction); 24 M.L.B.S.A. § 2-6, 5 M.L.B.S.A. §§ 101, 111-13 (asserting various areas of exclusive tribal court jurisdiction within the tribal lands).

In *Steffel v. Thompson*, the United States Supreme Court permitted a pre-enforcement First Amendment challenge to a law, but the law was a criminal statute. *See* 415 U.S. 452, 459, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974). The Court limited potential prosecution claims to cases where the threat of prosecution is not imaginary, speculative, or chimerical. *Id.; United Food*, 857 F.2d at 425-30 (first amendment challenges to previously enforced criminal picketing statutes); *High Ol' Times, Inc. v. Busbee*, 621 F.2d 135, 138-39 (5th Cir.1980) (first amendment challenge to a criminal statute). These cases, in contrast to the present case, uniformly involve chilled speech, an area traditionally afforded a high degree of constitutional protection. Plaintiffs point to neither an imminent threat of criminal prosecution nor to a history of past prosecution. The ordinances about which they complain certainly present no threat to their right to free speech, or other fundamental rights.

Plaintiffs offer *Northern States Power Co. v. Prairie Island Mdewakanton Sioux Indian Community*, 991 F.2d 458 (8th Cir.1993), to support their claim to standing. Their reliance is misplaced. *Prairie Island* is distinguishable on its facts. In *Prairie Island*, the Mdewakanton Sioux expressed its present intention to enforce a tribal ordinance regulating the transport of nuclear waste on an established reservation which houses a functioning nuclear electrical generation plant. *Id.* at 459. On those facts, Northern States Power could easily demonstrate an actual ongoing injury stemming from the ordinance, including delays in the shipping of hazardous nuclear waste and the inability to monitor the safety of a nuclear energy plant. *See id.* at 463. *Prairie Island* is not analogous to this case.

The Mille Lacs Band has neither threatened nor demonstrated an intention to enforce its ordinances beyond its 4000 acres. *See Assoc. of Prop. Owners/Residents of Port Madison Area v. Individual Council Members of the Suquamish Tribal*

Council, C01-5317FBD, *4 (W.D. Wash. April 17, 2002) (finding no injury where tribe had not tried to enforce ordinance against plaintiff). The only shred of evidence supporting plaintiffs' claim of imminent enforcement is a March 23, 1992, letter from defendants concerning licensing. Defendants claim this letter was sent in error, and that licensing is required only of those with whom the Mille Lacs Band, itself, does business.[7] Given that the Mille Lacs Band sent this letter more than 10 years ago, has run its licensing program for the past 11 years, and has never directly contacted either plaintiff, the Court finds the proffered letter wholly fails to demonstrate an immediate or certain threat of enforcement or injury. Absent a credible threat of enforcement, plaintiffs' claims are mere conjecture and do not give rise to standing. *Brown-Outagamie-Oneida Jurisdiction Comm'n v. Powless*, 85-C-1052 (E.D.Wisc. Sept. 28, 1990) (finding case not ripe where tribe had not attempted to enforce ordinance).

The text of the Mille Lacs Band ordinances similarly fails to prove pending enforcement. The only reference to the 1855 reservation is in the definitions section of the hunting, fishing, and wild rice ordinances. *See* 11 M.L.B.S.A. § 2001(n). This reference facially relates to the landmark *Minnesota v. Mille Lacs Band of Chippewa Indians* case. Such a limited reference is insufficient to indicate an intent to enforce all of the Mille Lacs Band ordinances on the land within the 1855 boundaries.[8]

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[7] A similar letter, sent in 2001, expressly includes only those doing business with the tribe, *see* Pl.Ex. 18. This letter appears consistent with defendants' sworn statements. *See* Twait Dec. at 2; Big Bear Aff. at 1-2.

[8] Similarly, 11 M.L.B.S.A. § 9(e), which provides jurisdiction to enforce environmental regulations, is limited to the extent of United States law. As federal law largely proscribes the broad assertion of tribal jurisdiction over non-Indians, *Nevada v. Hicks*, 533 U.S. at 388- 92, 121 S.Ct. 2304, the Court will not construe this provision beyond both actual enforcement and its terms.

The County complains it has been injured in its ability to protect public safety, citing concerns over civil regulatory and traffic laws, and zoning regulations. It insists, therefore, that it needs this Court's clarification of tribal land boundaries.

The Tenth Circuit Court of Appeals considered this issue in *Norvell v. Sangre de Cristo Dev. Co., Inc.*, 519 F.2d 370 (10th Cir.1975), in which the State of New Mexico sought a declaratory judgment establishing the scope of its jurisdiction over a company operating on reservation land. *Id.* at 371-72. New Mexico claimed its "direct concern[ ] with the applicability of its laws and regulations not only as to the Company, but derivatively to the community of approximately 15,000 non-Indian persons who will ultimately live and do business in the non-Indian community" was sufficient to create an actual case or controversy. *Id.* at 374. The appellate court did not agree, holding that absent evidence that Indians were refusing to comply with state law, no case or controversy existed. *Id.* at 376-77. The same principle holds here; the County's mere interest in the proper enforcement of law and community safety does not provide standing. *Id.*

The Mille Lacs Band and its members have consistently complied—however grudgingly—with the County's zoning regulations and state traffic laws. The deposition testimony of the Mille Lacs County Sheriff, Dennis Boser, indicates the Mille Lacs Band has taken no actions which adversely affect the County's ability to enforce state or county law, and that any legal conflicts which do exist have not harmed public safety. *See* Pl. Bank Ex. 7 at 14, 19, 47. Even assuming the Mille Lacs Band members obey the County's ordinances only "under protest," plaintiffs have not shown that their compliance "under protest" has created a real injury.[9] When

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[9] The cases cited by the County cannot be read to stand for this proposition. See, e.g., *Altvater v. Freeman*, 319 U.S. 359, 63 S.Ct. 1115, 87 L.Ed. 1450 (1943) (continued dispute over reissued patents gave rise to controversy); *Atchison, Topeka & Sante Fe Railway Co. v. O'Connor*, 223

examined, the County's position appears to be that the Court should hold that defendants' *compliance* with County law constitutes injury. The Court is unable to find any legal precept that can support this theory.

The County's concern over potential liability similarly affords no colorable claim. The County claims its potential liability stemming from law enforcement beyond its jurisdiction constitutes a cognizable injury. It supports this position by citing *Ross v. Neff*, 905 F.2d 1349 (10th Cir.1990), in which a state police officer arrested an Indian in Indian Country in a non-Public Law 280 state. This arrest led to a civil rights case involving potential municipal liability. The Court finds *Ross* insufficient to support this claim.

It is clear that potential liability stemming from a filed complaint can be sufficient to create standing. *See Va. Sur. Co. v. Northrop Grumman Co.*, 144 F.3d 1243, 1246 (9th Cir.1998). On the other hand, an amorphous threat of future liability alone does not result in injury. If such an inchoate claim could support standing, a court could intervene whenever any entity faced the possibility of future litigation. *See O'Shea v. Littleton*, 414 U.S. 488, 497, 94 S.Ct. 669, 38 L.Ed.2d 674 (1974) (finding plaintiffs lacked standing to complain of an injury that would occur "*if* they proceed[ed] to violate an unchallenged law and *if* they [were] charged, held to answer and tried in any proceedings"); *Caribbean Marine Serv. Co., Inc. v. Baldrige*, 844 F.2d 668, 675 (9th Cir.1988) (finding no standing where plaintiffs claim increased exposure to liability dependent on multiple contingencies); *City of South Lake Tahoe v. Cal. Tahoe Reg'l Planning Agency*, 625 F.2d 231, 238-39 (9th Cir.1980) (finding no standing where exposure to civil liability is speculative).

U.S. 280, 285-87, 32 S.Ct. 216, 56 L.Ed. 436 (1912) (action to recover taxes paid under protest). Neither case is premised on a defendant's actual compliance with a law.

Here, the County's exposure to liability depends on the likelihood of its officers' violating the constitutional rights of Mille Lacs Band members by reason of municipal policy or custom. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). The Court has no evidence before it which suggests such an illegal policy is in place in Mille Lacs County. This scenario is scarcely the kind of risk upon which jurisdiction can be based. The Court must, absent evidence to the contrary, assume the County's law enforcement officers will continue to protect the citizenry and avoid constitutional wrongs. The Court finds the County's proffered "threat of civil liability is too attenuated and conjectural to constitute a basis for standing." *Caribbean Marine*, 844 F.2d at 675.

Next, plaintiffs claim statements made by defendants regarding their rights under the 1855 Treaty have caused a loss or degradation of local real estate values. The Bank claims $11,000,000 in real estate loans have been jeopardized; the County claims a loss of property tax revenue and a potential diminution of resale value should it sell municipally-owned land. Plaintiffs offer these claims, underpinned by the affidavit of real estate appraiser Roger Wagner. The Court rejects this insubstantial evidence.

Mr. Wagner's affidavit lacks the foundation necessary to fulfill Rule 56(e)'s requirement that statements in reply to a motion for summary judgment "set forth such facts as would be admissible into evidence." The only "fact" underlying his opinion is a published advertisement identifying a piece of property as "outside the disputed boundaries." He offers neither statistical nor empirical evidence comparing land values within or without the 1855 reservation boundaries. He does not point to a single instance where the Bank has ever declined a mortgage or tendered one at a higher rate for property within or without those borders. The affidavit does not state that property values are lower in Mille Lacs County

compared to its surrounding neighbors either as a result of or in connection to any perceived risk. Plaintiffs' "expert" offers nothing other than conjecture to show that verbal sparing over the 1855 boundaries has caused any devaluation or decline in real estate values. Mr. Wagner presents no data or quantification as to the actual lost value caused by the dispute, but merely offers his personal belief that some effect has occurred.

The Court notes the 1855 reservation borders include much of Mille Lacs Lake and other highly desirable vacation, business, and residential property. Taking into account the historically strong interest in owning this lakefront property, and the absence of evidence of so much as a single sale where proximity to Indian Country affected price, the Court finds plaintiffs allege no injury or risk of future injury.

Setting aside the utter paucity of admissible evidence supporting this claim, there is another problem with this proffered jurisdictional theory. Even assuming plaintiffs have correctly described landowners' fears, any claimed diminution of land value would result from the disinterest of third-party potential-purchasers in owning land in the reservation—not from legal uncertainty. The impact of this Court's decision depends, therefore, on actions of third-party property buyers and owners who are not parties to this litigation. *See Lujan*, 504 U.S. at 560-61, 112 S.Ct. 2130 ("there must be a causal connection between the injury and the conduct complained of—the injury has to be 'fairly . . . traceable to the challenged action of the defendant, and not . . . the result [of] the independent action of some third party not before the court'"). Independent personal decisions on land value remain outside the control of the Court. Because this Court cannot affect buyers perceptions about the nature of title within a reservation—however unfounded—a decision on the merits will not redress these concerns.

Plaintiffs' devaluation argument also reflects confusion as to the nature of declaratory relief. Plaintiffs ask the Court to determine whether the 1855 reservation continues as a valid legal entity. The Court may decide the case as plaintiffs wish and find the reservation disestablished or diminished. But the Court could also make the contrary ruling and find the 1855 reservation a legally valid entity. If the Court were to do so—and notably the defendants have *not* sought this finding—the result could well solidify rather than ameliorate plaintiffs' fears. Plaintiffs' complaints stem then, not from uncertainty, but from fears and perceptions concerning an unfavorable decision on the lawsuit they have themselves initiated. This is not the kind of injury the law recognizes as conferring standing.

Before the Court will invoke its sweeping declaratory judgment power, it must preside over a live controversy. Here, plaintiffs have not offered proof that such a controversy of constitutional dimension exists. The Court, therefore, cannot address the serious issues before it.

B. *Ripeness*

As an alternative, but certainly related basis, the Court finds this case is not ripe for adjudication. *See U.S. Const. Art. III; see also United Food*, 857 F.2d at 425-26 (applying ripeness to Declaratory Judgment Act). The ripeness doctrine precludes any decision on a legal or factual question absent "a real, substantial controversy between parties having adverse legal interests, a dispute definite and concrete, not hypothetical and abstract." *See Babbitt*, 442 U.S. at 298, 99 S.Ct. 2301 (quotations omitted). Ripeness requires "fitness of the issues for judicial decision" and examination of "the hardship to the parties of withholding court consideration." *See Abbott Labs. v. Gardner*, 387 U.S. 136, 149, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967).

The Declaratory Judgment Act calls upon the Court to apply a heightened standard of ripeness, allowing judicial intervention only where "there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *See Lake Carriers Ass'n v. MacMullan*, 406 U.S. 498, 506, 92 S.Ct. 1749, 32 L.Ed.2d 257 (1972); *Gopher Oil Co. v. Bunker*, 84 F.3d 1047, 1050 (8th Cir.1996) (citing *Caldwell*, 755 F.2d at 649). The Court's declaratory power is strictly discretionary, *see Wilton v. Seven Falls Co.*, 515 U.S. 277, 282, 115 S.Ct. 2137, 132 L.Ed.2d 214 (1995), and is to be exercised with caution.

The Court finds this litigation involves only hypothetical and speculative disagreements. *See Cass County v. United States*, 570 F.2d 737, 738 (8th Cir.1978) (finding generalized claims of confusion over jurisdiction lack needed specificity). According to plaintiffs, legal uncertainty over tribal jurisdiction within the 1855 reservation boundaries has created an unbearable hardship requiring judicial action[10] While the Courts have found uncertainty regarding legal status can justify judicial action in a limited number of cases, *see, e.g., Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 581, 105 S.Ct. 3325, 87 L.Ed.2d 409 (1985), those cases involved a clear injury in the absence of judicial action. *See*

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[10] Plaintiffs support this contention by pointing to Justice Souter's concurrence in *Nevada v. Hicks*, 533 U.S. 353, 383, 121 S.Ct. 2304, 150 L.Ed.2d 398 (1995). That case involved a tribal court's assertion of jurisdiction over state actors in a § 1983 case. The language plaintiffs quote, however, comes from a portion of Justice Souter's opinion which urges ending any linkage of tribal jurisdiction from status. He argues that maintaining this connection creates an "unstable jurisdictional crazy quilt." *Id.* At best, the quoted language can be read as a call for bright-line rules governing subject matter jurisdiction for tribal courts. The Court cannot find in the Justice's quoted language any support for a requirement to resolve every possible dispute over land ownership or reservation status.

id. (wherein regulation restricted access to jury trial). Here, any overlapping jurisdictional claims are highly conjectural, and a decision on these abstracted claims is unwarranted. *See Cass County*, 570 F.2d at 741-42 (connecting boundary decisions to disputes over taxing authority, criminal jurisdiction, and fishing and hunting rights cases).

Plaintiffs cite a number of cases where courts have resolved land disputes through declaratory judgment, but none of them are analogous to this case. In each of the cited cases, there were concrete and specific incidents involving reservation boundaries and sovereignty. *See id.; Yankton Sioux Tribe v. South Dakota*, 796 F.2d 241 (8th Cir.1986) (conversion and declaratory action arising from non-Indian harvesting on a reservation lake).

Plaintiffs ask the Court to focus on the *Rosebud Sioux Tribe* litigation. *See Rosebud Sioux Tribe v. Kneip*, 375 F.Supp. 1065 (D.S.D.1974), *aff'd* 521 F.2d 87 (8th Cir.1975), *aff'd* 430 U.S. 584, 97 S.Ct. 1361, 51 L.Ed.2d 660 (1977). That suit sought a declaration of the original reservation boundaries intact after the defendant county exercised both civil and criminal jurisdiction over tribe members. 430 U.S. at 585, 97 S.Ct. 1361, 51 L.Ed.2d 660. In *City of New Town v. United States*, 454 F.2d 121 (8th Cir.1972), plaintiff, a North Dakota municipality, sought declaratory relief in the wake of particularized challenges to municipal authority. Even if plaintiffs have tracked the pleadings filed in those cases, their having done so does not make this dispute ripe. The distinction is pristine: *Rosebud Sioux* and *City of New Town* presented ripe factual disputes; this one does not. The cited cases involved explicit efforts by one sovereign to exercise particular powers beyond their lawful jurisdiction; they did not present abstracted concerns over reservation boundaries.

Plaintiffs offer a laundry list of problems and fears they feel are related to the possible existence of the 1855 reservation boundaries, and suggest these make this case ripe for

adjudication. Their list includes greater regulatory authority under the EPA and National Historic Preservation Act, limits on county and state regulatory authority, and an expansion of the reach of tribal authority and sovereignty should the 1855 boundaries be in place. This litany of concerns misapprehends ripeness. If the Band's tribal authority covers the full extent of the 1855 reservation, it might well alter private and public sector relationships in the Mille Lacs area. The mere fact that a decision will be momentous does not, however, make this the proper time to render it.

Similarly, the ordinances examined above do not provide evidence of hardship. Simply put, in the absence of any immediate or impending concrete injury—where plaintiffs lack standing—any hardship caused by delayed review is conjectural. Plaintiffs claim the mere possibility that the Mille Lacs Band might try to enforce its ordinances is a valid ongoing threat, even if the ordinances have never been enforced. As explained, the law permits declaratory relief in a limited number of circumstances where enforcement is pending. Those circumstances are not present here; the parties are not faced with a choice between protected conduct and a risk of sanction. *See Caldwell*, 755 F.2d at 650 (stating the "threat of enforcement must have immediate coercive consequences" in order to intervene before regulatory action).

Ripeness is a question of timing. This Court will not exercise its declaratory judgment authority to interpret treaties and decide grave questions regarding reservation disestablishment in the absence of a real dispute. Plaintiffs have failed to demonstrate why this Court should exercise its authority at this time. Accordingly, the Court lacks jurisdiction over this dispute.

III. *Conclusion*

It is axiomatic that federal court jurisdiction is limited. A justiciable case or controversy is central to the constitutional

constraints on a federal court's ability to act. The Court has found plaintiffs lack standing to bring their claims and, alternatively, their claims are not yet ripe for adjudication. Accordingly, IT IS ORDERED that:

1. Defendants' motion [Docket No. 31] is granted.

2. Plaintiffs' motion to strike [Docket No. 54] is dismissed as moot.

3. This case is dismissed with prejudice.

APPENDIX B

UNITED STATES COURT OF APPEALS
EIGHTH CIRCUIT

No. 03-2527, 03-2537

COUNTY OF MILLE LACS,
Plaintiff-Appellant,

FIRST NATIONAL BANK, OF MILACA,
Intervenor Plaintiff,

v.

MELANIE BENJAMIN, individually and officially as Chief Executive, Mille Lacs Band of Chippewa Indians; HERB WEYAUS, individually and officially as Secretary/ Treasurer, Mille Lacs Band of Chippewa Indians; SANDRA BLAKE, individually and officially as District Representative, Mille Lacs Band of Chippewa Indians; MARVIN BRUNEAU, individually and officially as District Representative, Mille Lacs Band of Chippewa Indians; HARRY DAVIS, individually and officially as District Representative, Mille Lacs Band of Chippewa Indians,
Defendants-Appellees,

STATE OF MINNESOTA; STATE OF SOUTH DAKOTA,
Amicus on Behalf of Appellant. County of Mille Lacs,
Plaintiff,

FIRST NATIONAL BANK, OF MILACA,
Intervenor Plaintiff-Appellant,

v.

MELANIE BENJAMIN, individually and officially as Chief Executive, Mille Lacs Band of Chippewa Indians; HERB WEYAUS, individually and officially as Secretary/ Treasurer, Mille Lacs Band of Chippewa Indians; SANDRA BLAKE, individually and officially as District Representative, Mille Lacs Band of Chippewa Indians; MARVIN BRUNEAU, individually and officially as District Representative, Mille Lacs Band of Chippewa Indians; HARRY DAVIS, individually and officially as District Representative, Mille Lacs Band of Chippewa Indians,

Defendants-Appellees,

STATE OF MINNESOTA, Amicus on Behalf of Appellant.

Submitted: Oct. 24, 2003
Filed: March 9, 2004
Rehearing and Rehearing En Banc Denied May 19, 2004.

Before RILEY, BOWMAN and SMITH, *Circuit Judges*.

SMITH, *Circuit Judge*.

County of Mille Lacs ("County") and the First National Bank of Milaca ("Bank"), appeal from an order of the district court dismissing their action seeking to determine the legal status of the boundaries of the Mille Lacs Band of Chippewa Indians ("Band") reservation. We affirm.

I.

The facts for this case extend back nearly 170 years. The district court opinion described them well, and we will not recapitulate them all. *County of Mille Lacs v. Benjamin*, 262 F.Supp.2d 990 (D.Minn.2003). Relevant to this appeal, the appellants brought suit in federal court seeking declaratory relief regarding the boundary status of the Mille Lacs Indian Reservation. The County and the Bank contend that the

reservation's boundary status is a critical issue to many residents in Mille Lacs County. The Bank alleges that the reservation's boundary status must be defined because the Band's assertion of regulatory authority over parts of the reservation's territory has had a negative effect on the value of the Bank's security interests. In the Bank's view, the Band's allegations of ownership and jurisdiction to parts of the reservation have harmed the Bank's economic interest.

The County contends that the uncertainty of the reservation's boundaries is detrimental to the County's ability to enforce laws and building and environmental permits that are directly dependent on the reservation's boundaries.

At the close of initial discovery, the Band moved for summary judgment on the following grounds: standing, ripeness, sovereign immunity, and indispensable party. The district court granted the Band's motion after determining that neither the Bank nor the County had standing to question the legal status of the reservation's boundaries. Also, the court determined that the present dispute was not ripe for adjudication. On May 7, 2003, the district court, in granting the Band's motion for summary judgment, dismissed the claim with prejudice. This appeal followed.

On appeal, the County and the Bank argue that they have suffered both threatened injury and present harms to their ability to plan and conduct business. Specifically, they allege numerous harms, including: greater regulatory oversight by the EPA, limits on county and state regulatory authority, and expansion of the reach of tribal authority. Lastly, the appellants contend that the district court erred in dismissing the suit with prejudice because the dismissal was based on jurisdictional grounds. We consider each argument in turn.

II.

We review a district court's grant of summary judgment based on standing de novo. *Oti Kaga, Inc. v. S. Dakota Hous.*

Dev. Auth., 342 F.3d 871, 877 (8th Cir.2003) (citing *Nat'l. Fed'n. of the Blind of Mo. v. Cross*, 184 F.3d 973, 979 (8th Cir.1999)). Summary judgment is proper if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). When ruling on a summary judgment motion, a court must view the evidence "in the light most favorable to the nonmoving party." *Oti Kaga, Inc.*, 342 F.3d at 877 (citing *Dush v. Appleton Elec. Co.*, 124 F.3d 957, 962-63 (8th Cir.1997)).

A. *Standing*

Federal courts only have jurisdiction to hear actual cases and controversies. U.S. Const. art. III, § 2, cl. 1. "[F]ederal courts are without power to decide questions that cannot affect the rights of litigants in the case before them." *North Carolina v. Rice*, 404 U.S. 244, 246, 92 S.Ct. 402, 30 L.Ed.2d 413 (1971). The controversy must be definite and concrete, touching the legal relations of parties having adverse *legal* interests. *Nat'l Fed'n of the Blind of Mo.*, 184 F.3d at 979 (emphasis added). A party must satisfy constitutional standing requirements for its case to proceed to adjudication. *Id.* A party has standing to bring a claim if it has suffered some actual or threatened injury.

"The controversy requirement of the Declaratory Judgment Act is synonymous with that of Article III of the Constitution." *Carson v. Pierce*, 719 F.2d 931, 933 (8th Cir.1983) (citing *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 239-40, 57 S.Ct. 461, 81 L.Ed. 617 (1937); *Cass County v. United States*, 570 F.2d 737, 739 (8th Cir.1978)). In order to demonstrate standing, a plaintiff must "demonstrate that he has suffered [an] injury in fact, that the injury is fairly traceable to the actions of the defendant, and that the injury will likely be redressed by a favorable decision." *Bennett v. Spear*, 520 U.S. 154, 162, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555,

560-561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992); *Valley Forge Christian Coll. v. Am. United for Separation of Church and State, Inc.*, 454 U.S. 464, 471-472, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982) (internal citations omitted)).

"The essential distinction between a declaratory judgment action and an action seeking other relief is that in the former no actual wrong need have been committed or loss have occurred in order to sustain the action." *Horne v. Firemen's Ret. Sys. of St. Louis*, 69 F.3d 233, 236 (8th Cir.1995) (quoting *United States v. Fisher-Otis Co.*, 496 F.2d 1146, 1151 (10th Cir.1974)). The County and the Bank argue that they have standing because they have suffered threatened injury caused by the Band's alleged ownership of certain parts of the Mille Lacs Indian Reservation. We disagree.

We give a district court's decision to dismiss a declaratory-judgment action unique and substantial discretion. *See Brillhart v. Excess Ins. Co.*, 316 U.S. 491, 62 S.Ct. 1173, 86 L.Ed. 1620 (1942); *Horne v. Firemen's Retirement System of St. Louis*, 69 F.3d 233, 236-37 (8th Cir.1995). Here, the district court correctly concluded that the appellants lacked standing.

The Bank alleged in its complaint that the Band's assertion of regulatory authority over property in which the Bank holds a security interest reduced the value of its collateral. Specifically, the Bank alleges that, if imposed, the Band's enactments could impact federal banking laws and the Minnesota Uniform Commercial Code thereby directly affecting the Bank's operations. Also, the Bank noted that the Band owns a nearby financial institution that competes directly with the Bank. The Bank provided affidavits of lenders expressing concern whether clear title to their property can be obtained in the disputed area. The Bank also provided letters from residents stating that they would not have purchased property within the boundaries of a reservation and that they would not have built a home within the boundaries of a

reservation. These statements of concern, however, do not establish an injury in fact. At best, they reflect speculative harms based upon the assumed future intent of the Band.

The County has failed to establish standing. We agree with the Band that the County has been unable to point to any definite controversy that exists from the Band's purported expansion of tribal jurisdiction over the disputed portion of the reservation. The County presented no evidence that its ability to enforce state or local law on the reservation has been usurped or even affected by the Band's alleged intentions. In order to demonstrate standing, a plaintiff must demonstrate that he has suffered an injury or a threatened injury. Neither the County nor the Bank has shown that it is in immediate danger of sustaining threatened injury traceable to an action of the Band. Therefore, they are unable to demonstrate standing. Furthermore, because there is no actual "case or controversy" before our Court, the ripeness issue is moot.

B. *Dismissal*

The district court issued its summary judgment with prejudice. A district court is generally barred from dismissing a case with prejudice if it concludes subject matter jurisdiction is absent. *Ahmed v. United States*, 147 F.3d 791, 797 (8th Cir.1998) (citing *Johnson v. Boyd-Richardson Co.*, 650 F.2d 147, 148 (8th Cir.1981) ("Under Rule 41(b) of the Federal Rules of Civil Procedure, dismissal for lack of jurisdiction is not an adjudication on the merits and thus such a dismissal should be without prejudice")); *Charchenko v. City of Stillwater*, 47 F.3d 981, 985 (8th Cir.1995). Because the district court dismissed solely on jurisdictional grounds, dismissal with prejudice is premature. We reverse this portion of the judgment and direct that the district court enter judgment without prejudice.

III.

In conclusion, we affirm the district court's dismissal for lack of standing. However, we reverse the district court's decision to dismiss the complaint with prejudice. The appellant's motion to supplement the record is denied.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 03-2527/2537

COUNTY OF MILLE LACS,
Appellant,

v.

MELANIE BENJAMIN, ETC., *et al.*,
Appellees.

Order Denying Petition for Rehearing and
for Rehearing En Banc

May 19, 2004

The petitions for rehearing en banc are denied. The petitions for rehearing by the panel are also denied.

(5128-010199)

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
Thomas F. Eagleton Court House
Room 24.329
VOICE (314)244-2400

April 19, 2004

Michael E. Gans
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FAX (314)244-2780
Clerk of Court
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Seattle, WA 98121

Mr. John B. Arum
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Suite 1230
2101 Fourth Avenue
Seattle, WA 98121

Re: 03-2527 *County of Mille Lacs vs. Melanie Benjamin*
Re: 03-2537 *First National Bank vs. Melanie Benjamin*

Dear Counsel:

Petitions for rehearing en banc have been filed by both Appellant County of Mille Lacs and Appellant First National Bank of Milaca in the above cases.

I have been instructed by the court to request you to respond to the petitions.

Please submit 25 copies of your response, limited to ten pages, by Thursday, April 29, 2004. If you have any questions concerning the court's request, please contact this office.

(5137-010199)

Michael E. Gans
Clerk of Court

mer

cc: Tommy Drake Tobin
Peter J. Pustorino
Janice S. Kolb
John P. Guhin
John S. Swimmer

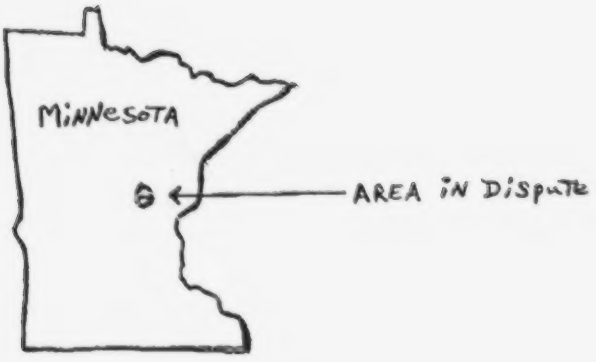
Kenneth B. Peterson
Scott Gregory Knudson
Bryant D. Tchida
Patrick S. Williams

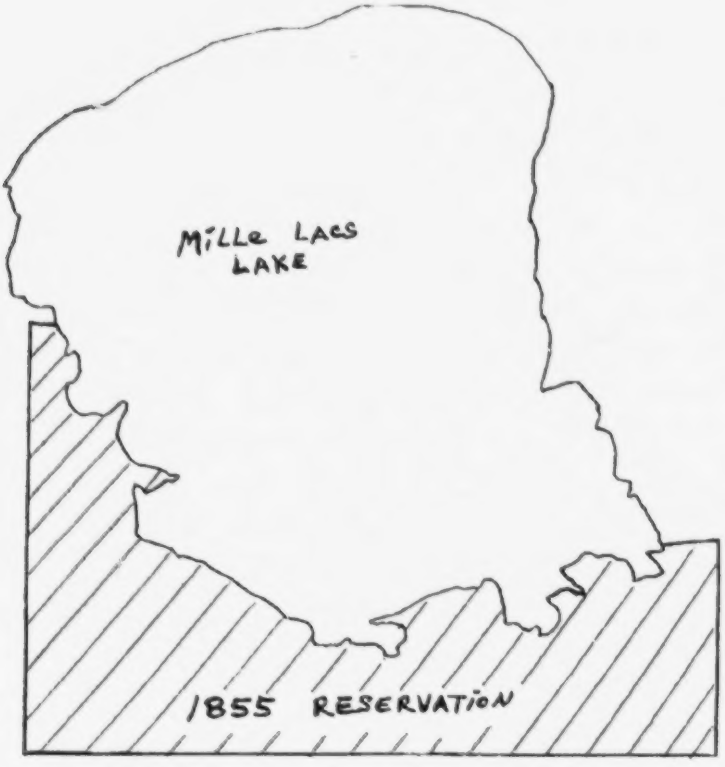
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District Court/Agency Case Number(s): CIV 02-407 JMR/RLE

APPENDIX E

MAP





APPENDIX F

SUPREME COURT OF THE UNITED STATES

No. 736

UNITED STATES, Appt.,

v.

MILLE LAC BAND OF CHIPPEWA INDIANS
in the State of Minnesota.

Argued April 8 and 9, 1913
Decided June 9, 1913

Mr. Justice Van Devanter delivered the opinion of the court:

This suit was begun under the act of February 15, 1909 (35 Stat. at L. 619, chap. 126), which authorized the court of claims 'to hear and determine a suit or suits to be brought by and on behalf of the Mille Lac band of Chippewa Indians in the state of Minnesota against the United States, on account of losses sustained by them or the Chippewas of Minnesota by reason of the opening of the Mille Lac Reservation . . . to public settlement under the general land laws of the United States.'

The lands to which the act and the suit relate are four fractional townships bordering on the Mille Lac in Minnesota, and three islands in that lake, comprising in all a little more than 61,000 acres. The suit was begun in the name of the Mille Lac band, and the court of claims, two judges dissenting, gave judgment against the United States in the

sum of $827,580.72, with a direction, in substance, that the amount recovered be credited to the Chippewas of Minnesota and distributed among them under the provisions of § 7 of the act of January 14, 1889 (25 Stat. at L. 642, chap. 24), 47 Ct. Cl. 415. The case is here upon the appeal of the United States.

The judgment was sought and was rendered on the theory that the lands were set apart and reserved for the occupancy and use of the Mille Lac band by treaties of February 22, 1855 (10 Stat. at L. 1165), March 11, 1863 (12 Stat. at L. 1249), and May 7, 1864 (13 Stat. at L. 693), and were subsequently relinquished to the United States pursuant to the act of January 14, 1889, supra, upon certain trusts therein named, and that in violation of those treaties and that act they were opened to settlement and disposal under the general land laws of the United States and were disposed of thereunder, to the great loss and damage of the Mille Lac band or the Chippewas of Minnesota.

The arguments at the bar and the briefs are addressed to these questions: 1. The scope of the jurisdictional act. 2. The rights of the Indians in the lands under the treaties of 1863 and 1864. 3. The effect to be given to the act of 1889 and its acceptance by the Indians. 4. Whether the disposal of the lands, or any of them, under the general land laws, was violative of the rights of the Indians.

The jurisdictional act makes no admission of liability, or of any ground of liability, on the part of the government, but merely provides a forum for the adjudication of the claim according to applicable legal principles. Nor does it contemplate that recovery may be founded upon any merely moral obligation, not expressed in pertinent treaties or statutes, or upon any interpretation of either that fails to give effect to their plain import, because of any supposed injustice to the Indians. *United States v. Old Settlers*, 148 U. S. 427, 469, 37 L. ed. 509, 524, 13 Sup. Ct. Rep. 650; *United States v. Choctaw Nation*, 179 U. S. 494, 535, 45 L. ed. 291, 307, 21

Sup. Ct. Rep. 149; Sac and F. *Indians v. Sac & F. Indians*, 220 U. S. 481, 489, 55 L. ed. 552, 556, 31 Sup. Ct. Rep. 473.

Under the treaty of 1855, supra, there were reserved for the occupancy and use of the Mississippi bands of Chippewas, of which the Mille Lac band was one, six separate tracts of land in Minnesota. One of these embraced the townships and islands before mentioned, and came to be separately occupied by the Mille Lacs, Although all the reservations were claimed in common by all the bands. By the treaty of 1863, supra, the lands in the six reservations, the one occupied by the Mille Lacs being in terms included, were expressly ceded to the United States (art. 1), and one large tract of other lands in Minnesota was reserved for the future home of all the bands, including the Mille Lacs (art. 2). Provision was made (art. 4) for clearing and breaking a limited area in the new reservation for each of the bands, the Mille Lacs being in terms included, and (art. 6) for removing the agency and sawmill from one of the ceded reservations to the new. Article 12 of this treaty was as follows,—special importance being now attached to its proviso: 'It shall not be obligatory upon the Indians, parties to this treaty, to remove from their present reservations until the United States shall have first complied with the stipulations of articles 4 and 6 of this treaty, when the United States shall furnish them with all necessary transportation and subsistence to their new homes, and subsistence for six months thereafter: Provided, That, owing to the heretofore good conduct of the Mille Lac Indians, they shall not be compelled to remove so long as they shall not in any way interfere with or in any manner molest the persons or property of the whites.' The treaty of 1864, supra, superseded that of 1863, and in so far as their provisions are material here they were identical, so we shall speak only of the later one. In addition to the creation of the single large reservation, provision was made for the payment of large annuities to the Indians in consideration for the cession of the six original reservations, and it is not questioned that these annuities were

duly paid to all the bands, including the Mille Lacs, nor that there was a full compliance with articles 4 and 6.

A treaty negotiated in 1867 (16 Stat. at L. 719) eliminated a considerable portion of the large tract reserved by article 2 of the treaty of 1864 and substituted a new tract, consisting of thirty-six townships, which came to be known as the White Earth Reservation. This treaty is not important here, save as it explains subsequent references to the White Earth Reservation.

A controversy soon arose over the meaning and effect of the proviso to article 12 of the treaty of 1864, declaring, 'that, owing to the heretofore good conduct of the Mille Lac Indians, they shall not be compelled to remove [from the old reservation to the new one] so long as they shall not in any way interfere with or in any manner molest the persons or property of the whites.' On the part of the executive and administrative officers it was insisted—not, however, without some differences among themselves—that the proviso did not invest the Mille Lacs with any right in the old reservation expressly ceded by article 1 of the treaty, but merely permitted them to remain thereon as a matter of favor; that one purpose of the cession was to enable the government to survey the lands and open them to settlement, and that it was not intended that the permission to remain should interfere with this. But the Mille Lacs maintained that the proviso operated to reserve the lands for their occupancy and use indefinitely, and that the lands could not be opened to settlement while they remained and conducted themselves properly towards the whites in that vicinity. The survey was made, the lands were declared open to settlement and entry, and entries in considerable numbers were allowed from time to time; but the Mille Lacs persisted in their claim and refused to move, although repeatedly entreated to do so. This continued to be the situation until the act of 1889 was passed by Congress and accepted by the Mille Lacs and other

Chippewas of Minnesota. In the meantime an order was issued by one Secretary of the Interior, suspending the allowance of further entries, as also further action upon those already allowed, and this order was recalled by a succeeding Secretary. Congress then passed the act of July 4, 1884 (23 Stat. at L. 76, 89, chap. 180), directing that the lands should not 'be patented or disposed of in any manner until further legislation.' The entries allowed up to that time covered about 55,000 acres, or approximately nine tenths of the lands, and some were under investigation upon charges that they were fraudulent. After the passage of the act of 1884, all further action was suspended awaiting further legislation.

That legislation came in the act of 1889. It provided for a commission to negotiate with all the bands of Chippewas in Minnesota for the cession and relinquishment of all their reservations, excepting the White Earth and Red Lake Reservations, and for the cession and relinquishment of so much of them as should not be required for allotments. It further provided that the cession and relinquishment should be obtained as to each reservation, other than the Red Lake, through the assent in writing of two thirds of the male adults of the band 'occupying and belonging to' it, and, as to the Red Lake Reservation, through a like assent of two thirds of the male adults of all the Chippewas in the state; that the cession and relinquishment as to each reservation should be subject to the approval of the President, and when approved should operate as a complete extinguishment of the Indian title 'for the purposes and upon the terms' stated in the act; that thereupon all the Chippewas in the state, excepting those on the Red Lake Reservation, should be removed to and take up their residence on the White Earth Reservation, and receive allotments in severalty therein, and allotments to those on the Red Lake Reservation should be made in that reservation; that any Indian residing on any of said reservations might, in his discretion, take his allotment 'on the reservation where he lives . . . instead of being removed;'

that the ceded lands not so allotted should be classified as 'pine lands' and as 'agricultural lands,' and be disposed of in the manner and at the prices stated in the act; and (§ 7) that all moneys accruing from their disposal, after deducting expenses, should be placed in the treasury of the United States to the credit of all the Chippewas of Minnesota as a trust fund, drawing interest at 5 per cent per annum, the interest to be used for their benefit and the principal to be distributed among them at the end of fifty years. In § 6 there was a proviso, deemed important here, declaring 'that nothing in this act shall be held to authorize the sale or other disposal under its provisions of any tract upon which there is a subsisting, valid pre-emption or homestead entry, but any such entry shall be proceeded with under the regulations and decisions in force at the date of its allowance, and if found regular and valid, patents shall issue thereon.'

Through negotiations conducted under the authority of that act, the commissioners secured agreements with the Indians embodying the contemplated cessions and relinquishments, and these, upon submission to the President, were approved by him March 4, 1890. The agreement with the Mille Lacs, in addition to embodying a cession and relinquishment of the lands in the White Earth and Red Lake Reservations not required for allotments, contained an express assent to all the provisions of the act of 1889, and an express relinquishment of the lands in the Mille Lac Reservation, as is shown by the following excerpt from the agreement:

> 'We, the undersigned, being male adult Indians over eighteen years of age, of the Mille Lac band of Chippewas of the Mississippi, occupying and belonging to the Mille Lac Reservation under and by virtue of a clause in the twelfth article of the treaty of May 7, 1864 (13 Stat. at L. p. 693), do hereby certify and declare that we have heard read, interpreted, and thoroughly explained to our understanding the act of Congress,

> approved January 14, 1889, entitled, 'An Act for the Relief and Civilization of the Chippewa Indians, in the State of Minnesota' (Public, No. 13), which said act is embodied in the foregoing instrument, and after such explanation and understanding, have consented and agreed to said act, and have accepted and ratified the same, and do hereby accept and consent to and ratify the said act, and each and all of the provisions thereof, . . . and we do also hereby forever relinquish to the United States the right of occupancy on the Mille Lac Reservation, reserved to us by the twelfth article of the treaty of May 7, 1864.'

This agreement was negotiated at a council of the Mille Lacs, wherein they reiterated their claim under article 12, and at first declined to assent to the act of 1889, but upon further consideration assented and then signed the agreement. The commission, in reporting the result of its labors, gave a tabulated statement of the reservations, with the area of each, covered by the relinquishments, and included the Mille Lac Reservation, with an area of 61,014 acres, in the statement. In submitting the agreements, including that with the Mille Lacs, to the President, with the recommendation that each be separately approved, as was done, the Secretary of the Interior referred to the prolonged controversy with the Mille Lacs and said: 'The rights of the Indians upon this reservation have been a vexed question, full of difficulties and embarrassments; but it is hoped that this agreement will furnish a basis for its early and final solution.' Upon approving the agreements (they were sometimes spoken of as constituting in the aggregate a single document) the President transmitted a copy of them and of the accompanying papers to Congress for its information, and in the letter of transmittal said: 'Being satisfied from an examination of the papers submitted that the cession and relinquishment by said Chippewa Indians of their title and interest in the lands specified and described in the agreement with the different bands or tribes of Chippewa

Indians in the state of Minnesota was obtained in the manner prescribed in the 1st section of said act, and that more than the requisite number have signed said agreement, I have, as provided by said act, approved the said instruments in writing constituting the agreement entered into by the commissioners with said Indians.' Shortly thereafter, and before the Mille Lacs removed from the old reservation, Congress passed the act of July 22, 1890 (26 Stat at L. 290, chap. 714), whereby a railroad right of way, including station grounds, was granted through that reservation upon condition that compensation therefor be paid to the United States for the use of the Indians, and that a failure to use the right of way and station grounds for railroad purposes should inure to the benefit of the Indians, thereby recognizing that the Indians had then come to have an interest in the disposal of the lands.

After the Mille Lacs gave their assent to the act of 1889 the entries theretofore allowed were examined and passed upon by the Land Department in regular course, and such as were found to be regular and bona fide were passed to patent. The remaining lands in the reservation were subsequently disposed of, not under the act of 1889, but under the general land laws, in pursuance of directions contained in the joint resolutions of December 19, 1893 (28 Stat. at L. 576), and May 27, 1898 (30 Stat. at L. 745).

Whatever might be said of its merits, it is apparent that there was a real controversy between the Mille Lacs and the government in respect of the rights of the former under article 12 of the treaty of 1864, and that the controversy was still subsisting when the act of 1889 was passed by Congress and assented to by the Indians. And we think it also is apparent that this controversy was intended to be and was thereby adjusted and composed. A manifest purpose of the act was to bring about the removal to the White Earth Reservation of all the scattered bands residing elsewhere than on the Red Lake Reservation, the Mille Lacs as well as the others; and this was

to be accomplished, not through the exertion of the plenary power of Congress, but through negotiations with and the assent of the Indians. The provision in § 6 for perfecting subsisting pre-emption and homestead entries, if found regular and valid, pointed most persuasively to a purpose to extend the negotiations to the Mille Lac Reservation. The commission, the Secretary of the Interior, and the President, in seeking, obtaining, and approving the relinquishment of that reservation, all treated it as within the purview of the act, and the Mille Lacs did the same. Then, too, Congress recognized by the act of 1890, shortly following the approval of the agreement, that the Indians had come to have an interest in the disposal of the lands in that reservation.

But while the government thus waived its earlier position respecting the status of the reservation, and consented to recognize the contention of the Indians, this was done upon the express condition, stated in the proviso to § 6, 'that nothing in this act shall be held to authorize the sale or other disposal under its provision of any tract upon which there is a subsisting, valid pre-emption or homestead entry, but any such entry shall be proceeded with under the regulations and decisions in force at the time of its allowance, and if found regular and valid, patents shall issue thereon.' In other words, the controversy was intended to be and was adjusted and composed by concessions on both sides, whereby the lands in the Mille Lac Reservation were put in the same category, and were to be disposed of for the benefit of the Indians in the same manner, as the lands in the other reservations relinquished under the act, but subject to the condition and qualification that all subsisting bona fide pre-emption and homestead entries should be carried to completion and patent under the regulations and decisions in force at the time of their allowance.

True, it is said on behalf of the Indians that they did not so understand the act; that is, did not understand that existing

entries could be thus carried to patent. But of this it is enough to observe that the language of the proviso to § 6 is plain and unambiguous; that the agreement recites that the Mille Lacs 'do hereby accept and consent to and ratify the said act, and each and all of the provisions thereof;' and that the Indians, no less than the United States, are bound by the plain import of the language of the act and the agreement. Not only so, but the act conferred upon the Mille Lacs many very substantial advantages which doubtless constituted the inducement to the adjustment and composition to which they assented. Among other advantages, it enabled them to share in the proceeds of the disposal of a vast acreage of lands in which they otherwise would have had no interest.

On behalf of the Indians it also is said that the proviso was limited to 'regular and valid' pre-emption and homestead entries, and that no entry of lands within an Indian reservation could come within that limitation. But this assumes the existence of the Mille Lac Reservation at the time of the entries, which was the very matter in dispute. Besides, the interpretation suggested could not be accepted without wholly rejecting the proviso, for if it was inapplicable to entries in the Mille Lac tract, it was equally inapplicable to any in the other tracts relinquished under the act. In saying this we do not indicate that there were other entries, for the reports of the Land and Indian Offices, which were before Congress when the act of 1889 was passed, disclosed the entries in the Mille Lac tract and did not show any others. Of course, the proviso cannot be rejected. It had an office to perform and must be given effect. It meant, as its terms plainly show, that entries made in accordance with existing regulations and decisions could, if bona fide, be carried to completion and patent in the usual way; and the phrase 'if found regular and valid' was evidently used with special reference to the charge that some of the entries were fraudulent, and with the purpose of eliminating such as were of that character.

We are accordingly of opinion that the act of 1889, to which the Indians fully assented, contemplated and authorized the completion, and the issuing of patents on, all existing pre-emption and homestead entries in the Mille Lac tract which, in the course of proceedings in the Land Department, should be found to be within the terms of the proviso to § 6, and therefore that no rights of the Indians were infringed in so disposing of lands embraced in such entries. And we think the evident purpose of the proviso requires that it be held to include entries of that class theretofore passed to patent, of which there were some instances during the early period of the controversy.

As respects other lands in that tract, that is, such as were not within the terms of the proviso, we are of opinion that they came within the general provisions of the act, and were to be disposed of thereunder for the benefit of the Indians, in like manner as were the ceded lands in the other reservations, of which it was said in *Minnesota v. Hitchcock*, 185 U. S. 373, 394, 46 L. ed. 954, 965, 22 Sup. Ct. Rep. 650: 'The cession was not to the United States absolutely, but in trust. It was a cession of all of the unallotted lands. The trust was to be executed by the sale of the ceded lands and a deposit of the proceeds in the Treasury of the United States, to the credit of the Indians, such sum to draw interest at 5 per cent.'

As before stated, the lands not within the proviso were disposed of, not under the act of 1889, but under the general land laws; not for the benefit of the Indians, but in disregard of their rights. This was clearly in violation of the trust before described, and the Indians are entitled to recover for the resulting loss. In principle it is as if the lands had been disposed of conformably to the act of 1889, and the net proceeds placed in the trust fund created by § 7, and the government then had used the money, not for the benefit of the Indians, but for some wholly different purpose. That the wrongful disposal was in obedience to directions given in two

resolutions of Congress does not make it any the less a violation of the trust. The resolutions, unlike the legislation sustained in *Cherokee Nation v. Hitchcock*, 187 U. S. 294, 307, 47 L. ed. 183, 190, 23 Sup. Ct. Rep. 115, and *Lone Wolf v. Hitchcock*, 187 U. S. 553, 564, 568, 47 L. ed. 299, 305, 307, 23 Sup. Ct. Rep. 216, were not adopted in the exercise of the administrative power of Congress over the property and affairs of dependent Indian wards, but were intended to assert, and did assert, an unqualified power of disposal over the lands as the absolute property of the government. Doubtless this was because there was a misapprehension of the true relation of the government to the lands, but that does not alter the result.

The court of claims gave no effect to the proviso to § 6, and the findings afford no basis for separating the damages rightly recoverable from those erroneously assessed on account of lands disposed of under pre-emption and homestead entries allowed prior to the act of 1889. The case must therefore be remanded for a reassessment of the damages.

By reason of a contention advanced in the briefs, it is well to observe that the damages should be assessed on the basis of the prices which would have been controlling had the act of 1889 been rightly applied.

The judgment is reversed, and the case is remanded for further proceedings in conformity with this opinion.

Reversed.

APPENDIX G

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Civ. No. 02-407 (JMR/RLE)

COUNTY OF MILLE LACS,

Plaintiffs,

vs.

MELANIE BENJAMIN, individually and officially as Chief Executive Mille Lacs Band of Chippewa Indians; HERB WEYAUS, individually and officially as Secretary/ Treasurer, Mille Lacs Band of Chippewa Indians; SANDRA BLAKE, individually and officially as District Representative, Mille Lacs Band of Chippewa Indians; MARVIN BRUNEAU, individually and officially as District Representative, Mille Lacs Band of Chippewa Indians; and Harry DAVIS, individually and as District Representative, Mille Band of Chippewa Indians,

Defendants,

and

FIRST NATIONAL BANK OF MILACA,
Movant for Intervention.

At Duluth, in the District of Minnesota, this 26th day of June, 2002.

This matter came before the undersigned United States Magistrate Judge pursuant to a general assignment, made in accordance with the provisions of Title 28 U.S.C. §636(b) (1) (A), upon the Motion to Intervene by the First National Bank of Milaca ("FNB"). FNB's Motion was filed on May 8, 2002, with a Hearing on the Motion set for June 6, 2002. In the interim, however, the Court had been advised that neither

the Plaintiff, nor the Defendants, opposed the Motion. Thus, after reviewing the Memoranda provided by all parties involved, as well as the applicable law, we conclude that a Hearing on the Motion is unnecessary, and we grant FNB's Motion to Intervene on the written Record.

Under Rule 24(a) (2),[1] Federal Rules of Civil Procedure, anyone has the right to intervene in an action upon timely application:

> [W]hen the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

In practical terms, "a party seeking mandatory intervention must establish that it: (1) ha[s] a recognized interest in the subject matter of the litigation that (2) might be impaired by the disposition of the case and that (3) will not be adequately protected by the existing parties." *Standard Heating and Air Conditioning Co. v. City of Minneapolis*, 137 F.3d 567, 571 (8th Cir. 1998) [alteration in original], quoting *Mausolf v. Babbitt*, 85 F.3d 1295, 1299 (8th Cir. 1996).

A "recognized interest" must be "'direct,' as opposed to tangential or collateral," and "both 'substantial' and 'legally protectable.'" *United States v. Union Elec. Co.*, 64 F.3d 1152, 1161 (8th Cir. 1995), citing *S.E.C. v. Flight Transp. Corp.*, 699 F.2d 943, 949 (8th Cir. 1983). To show that the interest might be impaired by the disposition of the case, an intervenor need only show that "the disposition of the action

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[1] Rule 24(a) (1), Federal Rules of Civil Procedure, permits intervention of right "when a statute of the United States confers an unconditional right to intervene." The Movant does not reference or rely upon any such statute, and we find this basis for intervention of right to be inapplicable.

may as a practical matter impair or impede the applicant's ability to protect [its] interest." *Kansas Pub. Employees Retirement Sys. v. Reimer & Koger Associates, Inc.*, 60 F.3d 1304, 1307 (8th Cir. 1995); cf., *S.E.C. v. Flight Transp. Corp.*, supra at 948 (threatened loss in market value of intervenors' homes sufficient). Moreover, the movant "need not show that, but for its intervention, its interest 'would be' impaired by the operation of res judicata, collateral estoppel, or stare decisis, but rather only that its interest 'may be' so impaired." *Kansas Pub. Employees Retirement Sys. v. Reimer & Koger Associates, Inc.*, supra at 1307. The intervenor bears the burden, albeit a minimal one, of showing inadequacy of present representation of its interests. See, *Chiglo v. City of Preston*, 104 F.3d 185, 187 (8th Cir. 1996). At bottom, Rule 24 should be liberally construed, with all doubts to be resolved in favor of the proposed intervenor. See, *Kansas Pub. Employees Retirement Sys. v. Reimer & Koger Associates, Inc.*, supra at 1307.

Here, the Plaintiff filed a Complaint, which seeks a declaration that the exterior boundaries of the 1855 Mille Lacs Indian Reservation were disestablished, or diminished, by specific Federal Treaties and Statute. The ostensible cause for the suit is the apparent claim of the Mille Lacs Band of Chippewa Indians ("the Band") that the former Reservation, which was once established by Treaty in 1855, between the United States, and the Chippewa Indians, continues to exist. According to FNB, based on this belief, the Band has asserted regulatory authority over businesses operating within the boundaries of the "former" Reservation. The assertion of regulatory power extends to FNB, which has property and substantial business, including the Band members, within the "former" Reservation boundaries. Thus, FNB seeks to intervene in order to protect its rights and interests, and argues that, but for its intervention, it rights and interests could be detrimentally impacted by a decision on reservation's status.

In that respect, FNB argues that this case is analogous to *Mille Lacs Band of Indians v. Minnesota*, 989 F.2d 994 (8th Cir. 1993), where our Court of Appeals considered whether Counties, and landowners, could intervene in an action between the Mille Lacs Band of Chippewa Indians, and the State of Minnesota, which concerned the Mille Lacs Band's hunting, fishing, and gathering rights, on land which had been previously ceded to the United States by Treaty. *Id.* at 996-98. There, the intervenors argued that the case could affect their property values or interests, since a decision favorable to the Mille Lacs Band could permit the Band members to exercise fishing, hunting, and gathering rights, allegedly reserved by Treaty, upon the proposed intervenors' land. *Id.* at 998. The Court concluded that intervention, under Rule 24(a), was appropriate, as both the County and the landowners had an interest in the land that they owned which could have been affected by the litigation. *Id.* at 1001. Moreover, the respective interests of the Counties, and the landowners, were found to be narrower than those of the State defendant and, as a consequence, the Court determined that those interests were not adequately represented by the State. *Id.*

We are bound by the Court's reasoning in *Mille Lacs Band of Indians v. Minnesota*, supra, which compels the grant of the Motion to Intervene. Here, FNB not only owns property within the "former" Reservation boundaries, but also has a legal interest, through loans, in a large amount of the property that could be affected by the disposition of this litigation. Moreover, as FNB does business within the "former" Reservation boundaries, and with the Band members, the Band's intent to regulate businesses within those boundaries could certainly affect FNB. Finally, FNB's interest is more narrow, and individualized, that the Plaintiff's interest, and, therefore, is not adequately represented by the Plaintiff. Accordingly, we conclude that FNB's timely-filed Motion to Intervene is proper, and should be granted.

NOW, THEREFORE, It is—

ORDERED:

1. That the Motion of First National Bank of Milaca to Intervene as a Plaintiff [Docket No. 13] is GRANTED.

2. That the First National Bank of Milaca shall, forthwith, serve and file a copy of its proposed Complaint, in accordance with the applicable Rules of Civil Procedure.

BY THE COURT:

_____

Raymond L. Erickson
UNITED STATES MAGISTRATE JUDGE

APPENDIX H

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Civil No. 02-407(JMR/RLE)

COUNTY OF MILLE LACS, *et al.*,
Plaintiffs,

FIRST NATIONAL BANK OF MILACA,

-v-

MELANIE BENJAMIN, *et al.*,
Defendants.

Motion Hearing
January 24, 2003

TRANSCRIPT OF PROCEEDINGS

HAD BEFORE THE HONORABLE
JAMES M. ROSENBAUM

Minneapolis, Minnesota

APPEARANCES:

FOR THE PLAINTIFF	TOM TOBIN PETER PUSTORINO
INTERVENOR PLAINTIFF	SCOTT KNUDSON
FOR THE DEFENDANT	MARC SLONIM JOHN ARUM BRYANT TCHIDA MARY BALBER PATRICK WILLIAMS

DAWN M. H. HANSEN, RMR-CRR
1005 U. S. District Courthouse
300 South Fourth Street
Minneapolis, Minnesota 55415
(612)664-5107

PROCEEDINGS

[2]

THE CLERK: Your Honor, the matter on the calendar is *County of Mille Lacs versus Melanie Benjamin, et al.* Civil number 02-407. Will counsel please stand and state their appearance for the record?

MR. TOBIN: Tom Tobin, Mille Lacs County.

THE COURT: Mr. Tobin.

MR. KNUDSON: Scott Knudson, Briggs & Morgan, for intervenor plaintiff, First National Bank of Milaca.

THE COURT: Mr. Knudson.

MR. TCHIDA: Bryant Tchida, Briggs & Morgan, for intervenor plaintiff, First National Bank of Milaca.

THE COURT: Mr. Tchida.

MR. WILLIAMS: Patrick Williams for Firstbank of Milaca.

THE COURT: Mr. Williams.

MR. PUSTORINO: Peter Pustorino for Mille Lacs County.

THE COURT: Mr. Pustorino.

MS. SCOGGS: Margaret Scoggs (phonetic) for the intervenor plaintiff.

THE COURT: Counsel, good morning.

MR. SLONIM: Marc Slonim for the defendants.

THE COURT: Mr. Slonim.

MR. ARUM: Morning, Your Honor, John Arum for the defendants.

THE COURT: Mr. Arum.

MS. BALBER: Good morning, Mary L. Balber for the [3] defendants.

THE COURT: Counsel, I'm sorry, I didn't hear your name either.

MS. BALBER: Mary L. Balber.

THE COURT: Good morning. The matter is before the Court for motions for summary judgment. I have read and reviewed the pleadings, and I'm familiar with the facts.

You may argue as you wish. I will also tell you, counsel, that your reply brief was badly out of conformance with the Court's rules. You're going to use your photo reduction capability to stuff lots more words into smaller type onto pages, that's not very helpful.

MR. SLONIM: Your Honor, I apologize, we followed the 11.5 rule and we didn't—

THE COURT: Want to check? Take a look at your first brief and your second one.

MR. SLONIM: We used 12 point in the first one, but the rules allow 11 point.

THE COURT: You may proceed.

MR. SLONIM: Marc Slonim. We represent the defendants, Melanie Benjamin, Herb Weyaus, Sandra Blake, Marvin Bruneau and Harry Davis, who are elected officials of the Mille Lacs Band of Ojibwa Indians. The plaintiffs in the case, Mille Lacs County and First National Bank of Milaca, seek a declaratory judgment that the Mille Lacs [4] reservation, which was established as the band's permanent home in an 1855 treaty, has been disestablished or diminished. Umm,

with the exception of lands held in trust by the United States, that relief would eliminate all tribal governmental authority over these lands and would eliminate all federal governmental authority arising under statutes relating to Indian country. The complaints do not challenge the enforcement of any particular band statute and do not seek relief with respect to any particular band statute.

THE COURT: What did the Supreme Court say about whether or not, or has the Supreme Court said anything about whether or not the Mille Lacs band has been disestablished?

MR. SLONIM: The band as an Indian tribe?

THE COURT: No, the reservation.

MR. SLONIM: The reservation. There's one Supreme Court case that addresses the reservation. That's a 1913 decision. Umm, that case, the issue in this case was whether the band or the Minnesota Chippewa as a whole were entitled to compensation for the disposition of lands within the reservation. Umm, in the course of deciding that issue, the court discussed the effect of treaties that were made with the band in 1863 and 1864. It said that those treaties, umm, gave rise to a dispute about the status of the reservation and that that dispute was resolved in the Nelson Act. And that in the Nelson Act the government [5] agreed to accept the position of the band that the reservation continued to exist. So as to the 1863 and 1864 treaties, we believe that the Supreme Court held that they did not disestablish the reservation.

THE COURT: Did the Supreme Court refer to it as disestablished?

MR. SLONIM: No, it did not.

THE COURT: When I say it, I do not suggest that the band is disestablished. I'm speaking about the land here.

MR. SLONIM: Okay. But the Court said in the Nelson Act the government accepted the position of the band as to

the status of the reservation, and the band's position was that the reservation existed and it had the right to occupy the reservation.

THE COURT: All right.

MR. SLONIM: So we think that that case strongly supports the proposition that those treaties did not disestablish the reservation. The court did not address the effect of the Nelson Act on the continued existence of the reservation. That wasn't an issue in the case. And if you look at the—

THE COURT: What did the Nelson Act do?

MR. SLONIM: The Nelson Act was, provided for the relinquishment.

THE COURT: For compensation for relinquished [6] lands.

MR. SLONIM: Yes, but it also allowed tribes to remain within their reservation toss select allotments and to remain within their reservations. There are a series of cases in this court and in this case and the Eighth Circuit that deal with the effect of the Nelson Act. The first one was Judge Devitt's case, *Leech Lake Band versus Herbst* in 1971. In that case Judge Devitt held that the Nelson Act did not disestablish the Leech Lake reservation. Umm, and in fact he noted in that case that there were seven Chippewa reservations in the state, including the Mille Lacs Reservation, and that his holding with respect to the Nelson Act would affect the rights of the Chippewa tribe on other reservations, including in particular the Mille Lacs Reservation, and that was what was represented to him by counsel, including the U.S. Attorney's Office, the Minnesota Attorney General's Office—

THE COURT: I didn't see any reference to it being a nonmovable band in your pleadings.

MR. SLONIM: Well, we haven't addressed the merits, Your Honor.

THE COURT: I understand.

MR. SLONIM: What we've addressed is whether you should get to the merits. Umm, and obviously if we get to the merits at some point, the band's history as a [7] nonremovable band will be something we'll address at some length. Umm, at this point we've tried to stay away from the merits and focus on the question of whether this Court has jurisdiction to entertain this case and to consider the merits.

THE COURT: Okay.

MR. SLONIM: Umm, we think the Court does not have jurisdiction for three reasons. First, we think the plaintiffs lack standing to bring this case; second, we believe that defendants enjoy sovereign immunity from the suit; and third, we believe the United States is an indispensable party. Let me begin with the standing.

THE COURT: Has the United States been found to be an indispensable party in these kinds of cases?

MR. SLONIM: Umm, I'm not aware of a case in which the issue has been raised.

THE COURT: Neither am I.

MR. SLONIM: In many of the cases the United States was a party. This case we think presents, when you analyze the case under Rule 19—8

THE COURT: Let me suggest it might be most useful for you to focus on the first two parts of your argument.

MR. SLONIM: Okay. Let me start with standing. At this stage of the case, the plaintiffs have the burden to submit evidence to satisfy each of the three elements. They must prove that there's been an injury in fact which is [8] both concrete and particularized, and which is either actual or imminent. They must prove that there's causation. That is that the injury may be—

THE COURT: One of the arguments that they make is that the band by suggesting that people, that businesses within the contested properties need to have a license issued by the band. They have presented a ripe question.

MR. SLONIM: Umm, as a factual—

THE COURT: Now, your argument in response, as I understand it, is the way we're working with it is, unless you're doing business with the band, it doesn't matter. But where does that put me?

MR. SLONIM: Well, Your Honor, umm, the band has been operating this licensing program for about eleven years. Umm, it has never contacted a business that is not interested in doing business with the band and asked it to get a license from the band. It has only contacted businesses that are either doing business with the band or have expressed an interest in doing business with the band That's, there's no evidence to the contrary. There's no evidence that it has ever contacted any other business.

THE COURT: But is it hypothetical that the—I mean, what you're saying is that in practice it hasn't had any effect. I think that's part of your argument, but the reality is the language of the statute, or the language of the ordinance is quite broad, and they, ah, suggest that [9] they are in dire concern over the possibility that you may decide to expand the use of it.

MR. SLONIM: Well, we think that the law of the Supreme Court and in the Eighth Circuit is that it's not enough simply to point to a statute which might be applied to you as a basis for standing. You either have to show that it has been applied to you, or that there's reason to believe that the application is imminent, and there isn't evidence of either of those things here. There's no evidence that it's ever been applied to the plaintiffs, and there's no evidence that it's imminent. Umm, what the practice shows is that the band applies its licensing

program to businesses both, it's not just inside the reservation. If there's a business in Minneapolis, if there's a business in California that does business with the band, they require that business to get a license from them. So this program isn't based at all on the reservation boundaries. It's based on entity, business entities wanting to do business with the Mille Lacs band. And it came out of the Indian Gaming Regulatory Act and the development of the bands' cassinos and their desire to make sure that there's no taint with any of their contractors or business partners, umm, that could jeopardize the casino operations. Umm, and that's how it's been practiced for eleven years. They have never indicated that they intend to expand the practice of [10] that operation.

THE COURT: Okay.

MR. SLONIM: That's plaintiff's burden is to show that that's been done. The other thing I would point out is that the plaintiffs have not stopped doing business because of this statute. There's no claim in the affidavits in this case, that there, out of a concern about this statute the bank has stopped doing business with the reservation. Quite to the contrary, the bank says it does substantial amount of business within the reservation, including with band members. So there isn't an injury here. I mean, if it's enough just to say there's a statute out there, then the plaintiffs would be correct, but we just don't think that's the law. They have to do more than that.

THE COURT: All right.

MR. SLONIM: Those comments I think were pertaining generally to the statutes I cite. These statutes have been on the books some for as many as 20 years—11

THE COURT: The bank asserts that the band's assertion of its tribal sovereignty, and in fact the reservation status of a substantial amount of the real estate around there is acting as a cloud on the title of people, and it is affecting both the merchantability of property and apparently, ah, some of the

protections that are available to them through insurance and things like [11] that.

MR. SLONIM: Well, there's the affidavit on this point comes from a gentleman named Roger Wagner that the bank has submitted. And Mr. Wagner says two things. Umm, he says that people are concerned about the ability to get clear title to their lands, and he says that people are concerned about future band regulations. Umm, I think everybody agrees that the existence of the reservation does not affect title to land. Umm, that whether the reservation boundaries exist or not, do not affect whether someone has title to their land. And a misfounded fear that there is some effect on title is not fairly traceable—

THE COURT: Can a freeholder hold the property in fee on reservation land?

MR. SLONIM: Certainly. It's, that exists all over the country, Your Honor. Umm, and it exists at the Leech Lake Reservation, which was at issue in Judge Devitt's case, it exists on the White Earth Reservation, it exists on 12 reservations all over this country.

THE COURT: All right.

MR. SLONIM: And that's, in fact that's what's behind a lot of the reason Supreme Court jurisprudence about tribal authority over nonmembers as a result of the General Allotment Act and other federal statutes, you have nonIndians who own fee lands and can transfer those lands, [12] can buy those lands and can lease those lands on reservations, and the Supreme Court has consistently curtailed the tribal authority to regulate or do anything those nonIndians. Umm, and there is, there's no case that I'm aware of that says the existence of a reservation boundary has anything to do with the ability to get clear title to lands. And there's no evidence in this case, or argument in this case that that's true. And so what you have is a misfounded fear, which is being attributed to the

defendants, but I don't think that gives you injury in fact under the Constitution. Umm, and this same—

THE COURT: There's also an aversion that's made that the law enforcement is impeded by an inability to determine exactly who has jurisdiction over who and what parts refer to what land. That assertion is made, I will refer to you Sheriff—

THE COURT: The reference to Sheriff Bozer's (phonetic) deposition, and references to speeches given by 13 tribal chairpeople, I'm not exactly sure what the weight or effect of those are in law. I mean, they're interesting, but.

MR. SLONIM: Let me start with the sheriff's deposition. The sheriff is the chief law enforcement officer from Mille Lacs County. We asked him—

THE COURT: Presumably they can elect another one.

MR. SLONIM: They have.

THE COURT: I understand, okay.

[13]

MR. SLONIM: He was the chief law enforcement authority at the time we took his deposition, and we asked him, has this issue about the reservation bound—

THE COURT: Yes, but I understand he said it hasn't had any effect. But the reality is is that the band has jurisdiction over Indians in Indian country. And the municipality or the county doesn't, true?

MR. SLONIM: Criminal jurisdiction?

THE COURT: Yes, sir.

MR. SLONIM: Certain types of jurisdiction. Minnesota's a public law 208 state.

THE COURT: I know.

MR. SLONIM: The county does have jurisdiction over Indians in Indian country, over criminal matters.

THE COURT: Okay.

MR. SLONIM: It doesn't have jurisdiction over 14 certain civil matters. Mille Lacs County takes the position that the reservation doesn't exist. And it enforces its, the state traffic laws, which is an issue that's come up here against Indians throughout the reservation except on Indian trust lands. It's done that consistently, umm, for as long as anybody remembers.

THE COURT: Since time immemorial.

MR. SLONIM: And there's been no interference with that. And the question here is is there an injury? Is there a harm to the county? And Sheriff Bozer says there isn't a harm. He knows there's a dispute about the [14] reservation, but he enforces the law, the county enforces the law, and there hasn't been a problem. Umm, I think it's, the other thing I would say about that is that under Franchise Tax War, the Supreme Court case that we cited, the county can't come to this court and say we want a declaratory judgment that it's okay for us to enforce our laws. Umm, their remedy is to enforce their laws, which is what they've been doing. If a band member at some point says wait a second—

THE COURT: Then fight it out through that system.

MR. SLONIM: If a band member says wait a minute you can't do this because I'm an Indian within the reservation, then the issue could be joined and they would resolve it in the state court enforcement action. 15

THE COURT: The U.S. Supreme Court, if they grant jurisdiction, but it doesn't come up through the federal system.

MR. SLONIM: Right.

THE COURT: I understand.

MR. SLONIM: Right. So I don't think those concerns about enforcement of state law either shows that there's an injury because the sheriff says there isn't one, or provides this Court with jurisdiction because of the franchise tax court problem.

THE COURT: The county asserts that certain assessments are paid and certain things are done, but [15] under protest, and that presents a ripe and justiciable controversy.

MR. SLONIM: Again, the question is was the injury to the county? Umm, if the band or a band member—

THE COURT: Checks aren't bouncing?

MR. SLONIM: Pardon?

THE COURT: Checks aren't bouncing?

MR. SLONIM: Checks are not bouncing, they're achieving compliance, they're enforcing their laws. Umm, it may be appropriate for the party who's complying to say I don't think I should have to comply, I've been hurt by being forced to comply, and so I want to challenge this now, but for the county to say, we've been injured because you're 16 complying with our laws doesn't make any sense. They haven't been injured. They're getting what they want.

THE COURT: Well, is there case law that recognizes or that holds that, ah, under protest, however, is not compliance?

MR. SLONIM: Not that I'm aware of, Your Honor. I'm not aware of any case, and I don't believe the county has cited any case which says that there's an injury that the county has suffered an injury because in complying the compliant party said we're doing this under protest.

THE COURT: Okay.

MR. SLONIM: They have achieved what they set out to achieve, which is compliance with their laws.

THE COURT: Would you focus your attention for a [16] ~~moments~~ on sovereign immunity?

MR. SLONIM: Yes, Your Honor. Umm, I think everybody agrees that the Mille Lacs band has sovereign immunity from suit, and that ordinarily band officials, who are the defendants here, would share in that immunity when they are acting in their official capacities.

THE COURT: But we seem to be grasping at something to do with In Re Young here.

MR. SLONIM: Yes. The plaintiffs say, well, sovereign immunity's not a problem because this is an ex parte Young case and Young says that a suit against the 17 state or in the Eighth Circuit at least, a tribal official, seeking prospective relief to prevent an ongoing violation of federal law is ordinarily not treated as a suit against the sovereign, which is fiction that you're not suing a sovereign, you're suing the official because he's acting outside the scope of sovereign authority. But in *Idaho versus Coeur du Lain Tribe*, the Supreme Court said wait a second, there's a limit as to how far you can stretch the Young fiction. In that case the tribe sought a declaration that Idaho laws purporting to regulate submerged land were invalid because they conflicted with the tribe's rights under federal law. It was a classic ex parte Young-type argument. But there was a claim against state officials, it was for prospective relief and there was an alleged ongoing violation of federal law. But the court said it's not within the Young exception. And we discussed this in our [17] memoranda. We think the critical factor in Coeur du Lain is that the relief sought would deprive the state of all governmental authority over the lands in question. And it couldn't be said in that situation, where you're suing state officials but you're basically saying there's no state sovereign

authority in this area, that you're not really seeking relief against the state. They were seeking relief against the sovereign.

Now, the plaintiffs say, well, no wait a second, 18 that case was different because it involved submerged lands. But the presence of submerged lands was significant because the tribe's claim to those lands implicated the state's sovereign interest. And it was the fact that the relief would divest the sovereign of all sovereign authority that led the court to conclude it was barred by sovereign immunity.

This case we think is like Coeur du Lain. It stretches the Young fiction too far. Because with the lands held in trust, the relief sought by the plaintiffs is designed to strip the band of all governmental authority over the lands in question. And it simply can't be said that that's not relief against the band. That is, the whole purpose of this case is to eliminate the band's sovereign authority over these lands. And the case is unlike Baker Electric and the Prairie Island case and other cases in [18] which the Young doctrine has been applied, because the case isn't about the enforcement of some particular statute. Umm, this isn't a case where someone has said we're concerned about this statute—

THE COURT: No, in this case they'd like to declare you nonexistent.

MR. SLONIM: That's essentially what this will do, strip away everything we have. And we think that's relief aimed at the band and is therefore barred by the band's 19 sovereign immunity.

THE COURT: Counsel, is there anything else?

MR. SLONIM: If I could reserve some time for rebuttal I'd like to do that, but I don't have anything else at this time.

THE COURT: Thank you.

MR. SLONIM: Thank you.

THE COURT: Counsel, may I suggest you speak over here only because that's where the sound pickup is.

MR. TOBIN: Thank you, Your Honor. Good morning, my name is Tom Tobin, and I'm here today representing Mille Lacs County.

THE COURT: Mr. Tobin, good morning. Mr. Tobin, what's your problem?

MR. TOBIN: Pardon me?

THE COURT: What's your problem?

MR. TOBIN: Well, we maintain that in accordance [19] with how we read Supreme Court precedent that this reservation has been disestablished.

THE COURT: That's not the question I asked. I said what's your problem?

MR. TOBIN: That, ah—

THE COURT: What is the concrete problem that Mille Lacs County's got that makes them have to do something? Which makes me have to do something?

MR. TOBIN: We maintain that the band's statutes and the refusal to disavow the reservation boundaries have created a case or controversy within the meaning of New Town and within the meaning of Rosemount.

THE COURT: Tell me what your injury is.

MR. TOBIN: What specifically injury?

THE COURT: Yes, sir. What am I going to fix?

MR. TOBIN: We're asking the Court to address the acts of Congress that disestablished those boundaries and that do not permit—

THE COURT: No, this is an easy question, counsel. What's wrong that needs fixing? It's an easy question.

MR. TOBIN: We maintain—if I understand the Court's, the Court's, ah, question in it wants specific injury, and is that the Court's—

THE COURT: I said what's wrong that needs fixing?

MR. TOBIN: We need to make sure that, we need, the Court needs to require that the band comply with federal law in its statutes and its actions. And in that respect [20]—

THE COURT: Why? What's the problem, counsel?

MR. TOBIN: Well, the first problem—

THE COURT: I mean, somebody comes into my courtroom and says they're going to take my house. That's a problem. Somebody says that, ahm, I'm supposed to be allowed to do this business and they're not letting me do 21 it. That's a problem. This morning a few minutes ago, a guy came in, said I'm supposed to have a building permit, I can't have a permit. What's your problem?

MR. TOBIN: We believe the first problem is the reservation boundaries and the claim of boundaries. Beyond that then, the state of Minnesota has held if in fact this area is a reservation or if we're dealing with a reservation, then we cannot enforce our civil regulatory laws.

THE COURT: Which regulatory laws haven't you been able to enforce?

MR. TOBIN: According to, we, we, we have not, we do not have state sanction to enforce civil regulatory laws dealing with drivers licenses, for example.

THE COURT: Have you tried to enforce them?

MR. TOBIN: Yes.

THE COURT: And what's happened?

MR. TOBIN: The reason that we've tried to enforce them is the sheriff has taken a position, and I believe [21] correctly

so, that until he sees a decision saying that this is a reservation, that he's going to live up to his obligation with respect to public safety requirements and enforce the law as he sees it as not, as if the area were not a reservation.

THE COURT: Has he enforced the law and somebody 22 not complied then?

MR. TOBIN: No, he has enforced the law, and the people have complied, that's correct.

THE COURT: Then what's the problem again? See, if somebody comes back and doesn't do it, then you run up through the state system, that's what Franchise Tax Board talks about. Okay? And I keep asking this easy question. What's the problem here, counsel?

MR. TOBIN: I guess my response here, Your Honor, is our problem is identical to the problem in New Town, and identical to the problem in Rosemount.

THE COURT: What happened in New Town?

MR. TOBIN: In New Town the city brought a Declaratory Judgment Act, as we have, and they said in that action that different people are taking actions, generally speaking, that are dependent upon reservation boundaries that we say do not exist and therefore we would like a declaratory judgment that would be addressed to those acts of Congress that we maintain disestablished the reservation. The same thing happened, only the flip side of the coin in [22] Rosebud Sioux Tribe. In Rosebud, the court said—excuse me. In Rosebud, the Rosebud Sioux Tribe sued four counties.

THE COURT: But that was where the moving party was the bands.

MR. TOBIN: The mutuality that the bands referred 23 to, that's correct.

THE COURT: Yup, okay. That's not what happened here.

MR. TOBIN: Not in this instance, no. But it's the flip side of New Town.

THE COURT: There's a big difference about who's surrendering to what jurisdiction and who's the moving party.

MR. TOBIN: In our, ah, in our opinion the pleadings are identical in both respects as they are in this particular case.

THE COURT: Okay.

MR. TOBIN: Ah, why—could I ask the Court why the Court is concerned that we make a difference whether the band would be bringing the suit or whether the county would be bringing the suit?

THE COURT: Well, the band bringing the suit would have a certainly an interesting aspect in terms of its sovereign immunity. Because it would have surrendered its immunity by bringing the suit.

MR. TOBIN: That would get to that third [23] question on sovereign immunity. We believe we get to that in any event.

THE COURT: I know what your belief is, but I'm saying seems to me there's quite a bit of difference between 24 them bringing the action and them getting hauled in.

MR. TOBIN: At base, Your Honor, we believe we're on all fours with both those cases. Clear to the United States Supreme Court. Now, we didn't get a chance in our brief, and I'd like to address this in some detail, we didn't get a chance to, to address the tribe's point on this, because, because they failed to bring these cases to the Court's attention in their opening brief, so we brought the cases to the Court's attention in our brief, and in reply, the band has said these cases are meaningless. Because the issue of case or controversy was not raised in either New Town or Rosebud. Now, if I might be allowed a couple of short quotes to respond to the band's position on that point, since we didn't get an opportunity to—

THE COURT: Well, counsel, I've got the opinions.

MR. TOBIN: Okay.

THE COURT: Those were published. They were good enough to supply them to me when I got the job. But you can focus on anything that you find interesting, but I will tell you I've got copies.

MR. TOBIN: Okay. The two quotes I was [24] referring to deal with justiciability that the point specifically that the tribe made. And the Eighth Circuit has said, it is axiomatic that a case or controversy must exist in all stages in the litigation and not merely at the time the 25 complaint is filed. They said that in the Alt case. And the Ninth Circuit said the same thing.

THE COURT: I would call that a generally unstunning observation.

MR. TOBIN: Correct, as I would, but I'm simply responding to a point in the briefs that the tribe has raised.

THE COURT: Okay.

MR. TOBIN: And I won't belabor it further other than mention that the chief justice, again Mr. Justice Renquist, said the same thing. Since the parties may not confer jurisdiction either upon the court or upon the district court, that doesn't foreclose the Court's inquiry with respect to Article III.

Now, in addition to the overarching controversy that we believe we have with reference to reservation boundaries, we think that the Stone question not being able to enforce the law without concern of liability is a very real problem that we have.

THE COURT: Well, let's back up again, because I got—has he tried to enforce the law? I mean, you're telling me is he thinks he's got a problem. But I'm telling you, the fact that people think they got a problem doesn't [25] necessarily

mean they got a problem, and I don't usually find that out unless somebody gets square on the question.

MR. TOBIN: I think I can respond to that by saying, as we read the case law—

THE COURT: And if he's worried about liability I think he's got a county that's willing to stand behind him. I haven't had a real problem with that in most of the cases I've had.

MR. TOBIN: And the sheriff's in good position to that respect because the case law we cited in our brief says that with reference to a 1983 action if he does what he does in good faith he's protected.

THE COURT: You can't even sue a sheriff in general in Minnesota, can you? You usually have to sue the county anyway. You can't sue the sheriff.

MR. TOBIN: Pardon me?

THE COURT: Other than personally.

MR. TOBIN: Maybe personally is what we'd be talking about here. Beyond that, then the case law goes on to say that the county cannot rely upon a good faith defense, so the county has a very real financial concern, irrespective of the sheriff's qualified immunity.

THE COURT: Okay, so what you're saying is, if the sheriff has no jurisdiction to arrest somebody, and because [26] the tribe has asserted jurisdiction over the land, and if they sue and if they prevail, the county is concerned about the, about its public risk.

MR. TOBIN: Precisely.

THE COURT: Okay.

MR. TOBIN: In addition to that, we also have other concerns, ah, that we believe are inherently present in this case because of the band's protests and the zoning and the other

actions that they have taken, ah, to comply with the, especially since this, or ordinances especially since this new suit became a matter of public knowledge. There are other factors such as you discussed a few minutes ago that are also of concern to the county such as depressed real estate values, since the court recognized in the Mille Lacs case the county owns land and has other interests there as well. Now, beyond that—

THE COURT: Is lakefront property less expensive up in Mille Lacs County?

MR. TOBIN: In the opinion of—

THE COURT: Because if it is, you can show it, you're going to have a lot of people comin' up there.

MR. TOBIN: In the opinion of the, ah, in the opinion of the bank's experts, and we didn't get an expert—

THE COURT: Having trouble getting financing up there? Nobody's closing real estate deals up in Mille Lacs [27] County?

MR. TOBIN: They've been fortunate in many respects.

THE COURT: Just trying to figure it out, counsel.

MR. TOBIN: But for this issue they might have been more fortunate. The expert's position is the value would be depressed below what it would ordinarily be if they weren't required to send out these notices saying, ah, whatever the state required them to send out saying that this was a problem—

THE COURT: Did the expert come up with statistical evidence showing lakefront property is worthless in Mille Lacs County?

MR. TOBIN: I think I'd rather let the bank respond, ah, if I might.

THE COURT: All right. But the next part of that is, does the county have standing to assert that claim on behalf of anybody?

MR. TOBIN: The county owns land in the property—I mean, owns land in the county and has other interests in—

THE COURT: County sellin' a lot of land lately?

MR. TOBIN: No, it isn't, Your Honor, but it does have interests—

THE COURT: I'm trying to find out what's ripe here, counsel, and you can tell that. Let's chase these [28] things down. County ain't in the real estate business, at least that I'm aware of.

MR. TOBIN: It does have interests in some lands. That was my only point.

THE COURT: Is your bonding authority impaired? I mean, the land that underlies it? You having troubles with your bonds up there?

MR. TOBIN: Not to my knowledge, Your Honor.

THE COURT: Okay.

MR. TOBIN: I do think across the United States that it's generally known that the fair market value of the land in Indian reservations, once it's established, is less than it is in neighboring counties. And there is testimony in several court cases to that effect. Now, beyond that I'd like to address sovereign immunity for a second, if I might.

THE COURT: All right. And you can do so briefly.

MR. TOBIN: Our reading of Coeur du Lain is the same as the Eighth Circuit's reading of Coeur du Lain. The Eighth Circuit said, and I quote, the court held that the action was barred in federal court because it was the functional equivalent of the quiet title action, which implicates special

sovereign interests. This case has nothing to do with the quiet title action. And this case does not implicate any—excuse me—does not implicate [29] any special sovereign interests—

THE COURT: That's an interesting argument, because the argument you're making is exactly that it is a cloud on title. That's the reason real estate values are depressed, according to you and everything else. That's a quiet title action.

MR. TOBIN: No, no, we're making the argument that if in fact the reservation—well, not in the sense that, we're simply asking the Court to construe the effect of certain acts of Congress.

THE COURT: I understand.

MR. TOBIN: And to say that the area is not in a reservation. And our action, we don't believe can be compared in any respect, any significant respect to Coeur du Lain. The special sovereign interest that the court was talking about in Coeur du Lain tied directly to what they called a functional equivalent, equivalent of a real quiet title action, and the special interests, sovereign interests, were tied to the doctrines involving navigable waters and the lands in the public trust in those lands. Now, the band's reference to sovereignty in Coeur du Lain we don't think will bring them within the purview of that doctrine. In fact the doctrines that we maintain are applicable and controlling here, Your Honor, are the same ones that the band told the federal district court in Mille Lacs I, that are controlling in this circuit. And that would be *Wisconsin v. Baker*, the Prairie Island case, and [30] the other ex parte Young doctrines.

THE COURT: I thank you, counsel. Anything else we haven't covered?

MR. TOBIN: In conclusion, I'd just like to say the band has said that judicial intervention in this matter, especially in

the absence of any case or controversy from their point of view, may only exacerbate tensions. And because we found that assertion to be disturbing, we asked the band to explain either in its briefs or oral argument what they meant by that remark, and that hasn't been done here today. Now, because we didn't get the explanation, we don't know the answer. But we do know that this case presents a legitimate controversy and that we submit that the settled law in this circuit is persuasive, and we sincerely believe that it is in the best interests of everyone to get this issue decided one way or another. And having said that, we hope you do it, Your Honor, and thank you for your time.

THE COURT: Thank you, counsel. Morning, Mr. Knudson.

MR. KNUDSON: Good morning, Your Honor. I'd like to focus, I believe the Court's very interested in what's, what's the harm, where's the beef?

THE COURT: What's your problem?

MR. KNUDSON: That's right. What is the problem? [31] I think there's two issues here that are affecting the justiciability question. First of all, standing, second question, aspect of that is ripeness. On standing, the question I think is, has the bank suffered an actual injury, something concrete? We have introduced evidence into the record that's unrefuted. We have argument of counsel attempting to address it, but we don't have factual information—

THE COURT: Well, what's the injury to the bank?

MR. KNUDSON: The bank's injury is, first of all as standing goes under the Eighth Circuit decision of granting intervention to the counties and landowners under the Treaty case, that the Eighth Circuit has held that the interests of a landowner within the disputed area is sufficient to confer standing to intervene in the case. You can't intervene unless you have a sufficiently concrete interest in the outcome of a

lawsuit. So the first point is, as standing goes, it's the law in the case. We move to—

THE COURT: Well, the law of the case binds you. But the law of the case doesn't bind me. You know that. We got a magistrate judge who allowed you to intervene, but that is not conclusive on a court's determination of the issues in a case.

MR. KNUDSON: The band had the opportunity to appeal that decision and did not. So I believe—

[32]

THE COURT: I understand. But the court is never bound by the law of the case. The litigants are bound by the law in the case, both sides.

MR. KNUDSON: Fair enough, Your Honor. Let's go right to what the bank has established, I think, as its injury in fact in this case. The bank has a branch in Isle.

THE COURT: I'm sorry?

MR. KNUDSON: The bank has a branch in Isle, Minnesota, which is within the disputed area. So it owns property within the disputed area. It does business within the disputed area, it has real estate mortgages in the disputed area. It does business with band members.

THE COURT: The testimony of Wagner—

THE COURT: If I'm correct, I would guess that the defendants' lawyers would agree to everything you just said. But we're still short the injury part.

MR. KNUDSON: I'm gettin' there.

THE COURT: Well, counsel, I'm a slow-minded guy. I'll go with you as long as you want, but at a certain point I'm going to ask you what's wrong.

MR. KNUDSON: With respect to the impact on the bank's financial interests, it's holding the real estate security

within a disputed area is affected. Wagner affidavit says so. And paragraph 6 it concludes—they don't refute this, Your Honor—it's my understanding the First National Bank of Milaca holds property—

[33]

THE COURT: A little slower, because you've got a court reporter taking down what you're saying.

MR. KNUDSON: Non real estate, which is in the disputed area. In my opinion the uncertainty arising out of the dispute over the reservation and its boundaries decreases the fair market value of that real estate. That's concrete financial impact on the bank.

THE COURT: Thin.

MR. KNUDSON: Standing doesn't require enormous, it just requires an actual harm.

THE COURT: Thin. You got one person who said in his opinion some piece of real estate, an unidentified piece of real estate, has had a diminished value. Thin.

MR. KNUDSON: It's—

THE COURT: Which piece of real estate is less, and what's the comparable that shows that in another county it's worth more? Does he say it in his affidavit?

MR. KNUDSON: It does not, Your Honor.

THE COURT: Okay.

MR. KNUDSON: He also observes, however, that the—

THE COURT: Are you having a hard time getting financing for your land out there? Is real estate not getting transferred in Mille Lacs County?

MR. KNUDSON: He's saying it is a market factor. [34] It is a selling point whether you're within or without the disputed area.

THE COURT: Do I have evidence showing that per square foot dollar value of real estate is cheaper either in Mille Lacs County or in the parts of Mille Lacs County that have a jurisdiction, tribal jurisdiction or asserted over them? Does he say that?

MR. KNUDSON: No, he does not, Your Honor.

THE COURT: Doesn't show me any comparables, does he?

MR. KNUDSON: He does not.

THE COURT: I mean, I've got an expert opinion, but I've also got Daubert, and I'm required to have admissible evidence in motions for summary judgment. I'm looking for a basis for that opinion.

MR. KNUDSON: The basis for that opinion, Your Honor, is stated out in his affidavit. I don't think you need to have comparables necessarily to—

THE COURT: Isn't that merely how they establish value?

MR. KNUDSON: No, Your Honor.

THE COURT: Okay. You may continue.

MR. KNUDSON: With respect to the Allen affidavit, I think Mr. Allen outlines the implications for being within or without the reservation on bank operations. More significantly with respect to what the band has done, it has [35] created a series of ordinances in its statute book that create, ah, jurisdiction within the tribal court to bring claims by band members arising out of what they would claim to be violations of federal truth-in-lending law. As well as Minnesota commercial statutes. That those ordinances go further and create—

THE COURT: Have they ever asserted a TILA claim or pulled a TILA claim into the tribal court yet?

MR. KNUDSON: Not yet, Your Honor, but I don't think—

THE COURT: Pardon?

MR. KNUDSON: Not yet, Your Honor. But the fact is it's not an issue of what the band says it is doing, which is eschewing regulation of the bank. Even though the statutes on their face apply to the bank, they're claiming well, we haven't enforced them yet. But any band member that does business with the bank could bring a claim in tribal court. So they've created a forum and claimed the exclusive jurisdiction over that claims in that forum. So the bank is subject to the regulatory jurisdiction of the band. And what turns in this case is whether or not the reservation continues to exist, because the territorial jurisdiction of the band to regulate the bank's activities depends on the existence of the 1855 reservation. Without that reservation in existence, the band's regulatory power over the bank is gone, because it's dependent on territorial jurisdiction. [36] I think on the issue of standing that the threshold to be shown is low at this threshold level, standing is not a you have to show actual injury. I think we've established actual injury. It may not be quantified in a large number, but if you look at the cases where people bring lawsuits to contest a regulation or a jurisdiction, the preliminary application, for example the environmental lawsuits, the level of interest in the outcome is comparatively low, but it's held to confer standing on the litigants. As long as they have sufficient interest in the outcome of the case to actually represent their side of the case adequately.

Now, the other aspect of this threshold issue is the ripeness factor. And there it's more of a prudential consideration as to whether or not this controversy is sufficiently well developed

to be adjudicated in this action. And I think it's beyond dispute that the question turns on the interpretations of two treaties and the Nelson Act. These are legal questions. No further factual development's required to resolve those legal questions.

So as far as a prudential consideration, this case is the appropriate vehicle to resolve the existence of the 1855 reservation. Nothing more needs to be developed in the record to determine, to reach the merits of those questions.

With respect to prior case law authority, if you look at the Prairie Island case, I think these have been [37] referenced already in argument, there's no need to enforce the ordinances in question to create a justiciable controversy. The Baker Electric case involved the establishment of a competing regulatory apparatus for the distribution of electricity in North Dakota, the Prairie Island case was whether or not NSP could import nuclear fuel into its facility to keep it operating, and the court in Judge Devitt said you don't need to enforce that statute to treat a ripe controversy.

I will simply conclude, I'll comment just briefly on the sovereign immunity argument a couple of points. Not raised or discussed. The question of tribal sovereign immunity is cohesive with the Eleventh Amendment. So I think there's a distinction that can be drawn between the Coeur du Lain case and what the band is arguing here on that basis alone.

And second, it was clear I think in the Mille Lacs case in the Eighth Circuit that they viewed the Coeur du Lain case as sort of a special application of an exception to ex parte Young, and ex parte Young in fact was reaffirmed by a majority of the court in Coeur du Lain. That's the theory upon which we are proceeding, and that was, you know, that theory was upheld in Baker Electric, the Prairie Island case, the Nintendo case over in the Tenth Circuit, which [38] essentially says if we rule the other way, the only place you

can go to litigate the existence of boundaries is the tribal court, and I don't think that should be a rule of law in this case.

THE COURT: I thank you, counsel. Do you see a need for any rebuttal?

MR. SLONIM: Umm, three minutes? Umm, just briefly on Mr. Wagner's affidavit, umm, there are two issues we would point out. One is whether the, even if you accept that there's some effect on property values based on that affidavit, has it been, can you trace that to the actions of the defendants? And we don't think Mr. Wagner's affidavit shows that. It shows that the effect that he says is there is a result of misapprehensions of what might be happening.

THE COURT: Well, that's—

MR. SLONIM: We'd also—

THE COURT: I'd be careful with that argument, counsel. If I want to buy a piece of real estate, and I would prefer not to have the Mille Lacs band assert jurisdiction over it, for whatever reason, that's not inchoate. I mean, that's the kind of thing that's going to make me say, you know, I'd rather do a different piece of real estate.

MR. SLONIM: Right. But I guess the question is is that caused by the band? The band is not asserting juris—

[39]

THE COURT: Let me put it this way: If I bought a piece of real estate in Minneapolis, there's no chance to my knowledge the Mille Lacs band is going to exert jurisdiction over it.

MR. SLONIM: It's the mere existence—

THE COURT: It's mere existence of whether this land belongs to and who it belongs to, and who the sovereign over the real estate is.

MR. SLONIM: The other thing we would refer you to is the case we cited, Soybean Association versus EPA, Eighth Circuit decision, and it talks about concerns about the effect on property values from potential regulatory actions in that case by EPA and says that does not give rise to a cognizable claim of injury. On Mr. Tobin's point about the Rosebud New Town Sioux cases, there are Eighth Circuit cases that say that if you have a decision that doesn't address an issue, even a jurisdictional issue, it's not authoritative precedent on that issue. Those cases are *Missouri versus Cuffley*, and also *Cass County versus United States*, which didn't rely on New Town for precisely that reason. The Rosebud Sioux case was brought by the tribe after the state in those counties exercised jurisdiction, not merely asserted jurisdiction, but exercised jurisdiction over tribal members. That's in [[40] the complaint in that case, which is page 8.

The potential liability concerns from enforcing county law I think are addressed by the Franchise Tax Board in *Missouri v. Cuffley* which applies that decision in the Eighth Circuit. The county has to go ahead and enforce its laws. And it doesn't get to come to federal court and say we want you to decide this first.

Umm, lastly, on Prairie Island and Baker Electric cases again, those cases don't discuss standing, but there clearly was an injury in those cases. Take the Prairie Island case, the band passed an ordinance aimed specifically at Northern States Power—

THE COURT: And told it it had to do X.

MR. SLONIM: Told it it had to do X. Northern States Power had stopped shipping radioactive materials because of that ordinance. There were public health risks, there were concerns about radio compliance, and the harm was so great they got preliminary injunction. So they proved harm in that case.

THE COURT: I thank you. I thank the people in the gallery for their attention and for the fact that they comported themselves very agreeably to the Court, and I thank you for your kindness in that regard. Thank you, counsel, and I will take this matter under advisement.

(Recess.)

[41]

CERTIFICATE

I, Dawn Marie Higby Hansen, do certify that the above and foregoing 42 pages of transcript are a true, correct, and accurate transcription of my stenographic notes taken in the above proceedings.

_____
Date

/s/ Dawn Marie Higby Hansen
DAWN MARIE HIGBY HANSEN
Official Court Reporter

APPENDIX I

Good morning.

Good morning your Honor.

My name is Tom Tobin, I am an attorney from Winter South Dakota and I am here today representing Mille Lacs County, Minnesota.

Judge: Why don't you get that microphone so you can speak up

Tobin: Okay

Judge: to make sure we can hear you.

Tobin: All right. Mille Lacs County is a small county on the south shore of beautiful Lake Mille Lacs in north central Minnesota. The County is approximately 20 by 50 miles square with a population of about 23,000 people some of whom are here today. In 1855 the Mille Lacs Band shared a 60,000 acre reservation in this northern part of the county. That area is now 90% owned and populated by nonmembers. In the early 1900s the Mille Lacs Band sued the United States and in that lawsuit they maintained they were due additional compensation although they conceded that the reservation no longer existed. The United States agreed with that position, but with reference to the fact that the reservation no longer existed, but disagreed with respect to compensation. The United States Supreme Court held that additional compensation was warranted and squarely accepted the position that the reservation no longer existed. Now in spite of this venerable 1913 opinion from the United States Supreme Court the Mille Lacs Band has maintained in recent years that the 1855 reservation still exists and as a result they have enacted statutes pursuant to that belief and the county of Mille Lacs filed this declaratory judgment action to resolve that question.

Judge: Well I guess the question here is standing and rightness. You know Mexico still claims Texas, yet it is not a real eminent threat that Mexico is going to take over Texas. What is so eminent here about the Indian Band just asserting that they still have the 61,000 acres.

Tobin: Well we maintain that the county has suffered injury in fact and that injury in fact is definite and concrete and I'll refer to five examples. The first example is that we have suffered the same jurisdictional injury that was present in Newtown and Rosebud and that was expressly noted in the United States Supreme Court in Virginia v. Hicks. Namely because this is a controversy between sovereigns jurisdictional ramifications are at issue and that constitutes injury in fact. It is sufficient to concur specifically sufficient to confer standing in Nevada in the *Virginia v. Hicks* case.

Judge: Do you have any incidents where the jurisdiction issues specifically has come up in cases of prosecution of individuals

Tobin: In *Virginia v. Hicks*, I think it was Justice Scalla said when a County's powers of prosecution are thwarted, that can confers standing on the County.

Judge: Well what I am asking would you have any incidents of where it has been thwarted the powers

Tobin: In this particular instance we have several that I'll get to in a moment. But mainly, first of all, our—we have one affidavit in the record refers to an individual who had a building permit from the county and his efforts to built on his property were thwarted by the Band because they said an additional permit was required from the Band and that is Dr. Schroeder. We have another incidence where the county was instructed to get a permit before it could proceed with building a road. The amicus curiae brief of the State of Minnesota makes clear that in numerous instances the Band has maintained that it should be treated as a state under EPA

regulations and that it has claimed jurisdiction county-wide. And as a result of those claims it has become a problem for the State of Minnesota in resolving those issues. Other examples would include a sewer agreement where one of the conditions in the agreement is that the Band will law be given primacy and those are four or five examples, briefly.

Judge: And those are all in the record.

Tobin: Yes. We also believe that we have a problem that the fact that we have real estate interests in the area in question confers standing on the County to proceed in this litigation in much the same way as this court held that it did in the Mille Lacs case in 1993. In that case it was pointed out that County governments have interest in tax forfeited lands and also other lands that they own outright and because of those property interests that the county was entitled to intervene in the Mille Lacs County case and because standing is a prerequisite to intervention we feel that that case strongly supports our position.

Judge: and of course there it was not discussed it was just apparently pursued by the parties. Is that what your point is? Standing, although it wasn't discussed it just everybody presumed that they had standing.

Tobin: It was a necessary prerequisite to intervention.

Judge: Yes.

Tobin: And I think the same thing was true in the *Rosebud* and *Newton* as well. They didn't discuss standing

Judge: Was standing objected to and ruled on?

Tobin: No it was not. But it is my understanding your Honor that with rightness or standing that the court is duty bound at any stage in the litigation to raise those questions if they see those as a problem in the litigation. So the court for example, Justice Rehnquist would have been duty bound to raise the question of standing in *Rosebud* had he not thought that a live

controversy and in that case controversy was present with all the requisite factors. Also the County has a problem with respect to the uncertainty regarding potential liability. This is injury in fact. At the present time the Sheriff out of concern for public safety and also out of respect for the United States Supreme Court 1913 decision routinely enforces the traffic laws in the area in question. The State of Minnesota has squarely held that if in fact this is a reservation the County would not have under public law 280 the right to enforce those laws and as a result if the Sheriff were subsequently proven wrong in his assumption that the Supreme Court was correct, then the County would be potentially liable under a 1983 action. We feel also that our injury is in fact continuing. We made a motion in this court to supplement the record with an affidavit where a county engineer was told that he had to have a permit in order to complete a road project. This month we have another gentlemen show up at the EPA on private property saying that he was administering a tribal program and every month there are additional instances in which ____ witnesses.

Honor: Was this a federal government employee from the EPA that said that did this?

Tobin: Yes.

Honor: Okay this is not some member of the Band.

Tobin: On the storage tank problem that is correct. But he said he was administering a Tribal Program. His card indicated that he was administering a Tribal Program and that the property in question was within the limits of the reservation. So as a result, I see my time is up, but I would like to reserve a couple of minutes for rebuttal, if I might.

Honor: Okay, you may. Thank you Tom. Mr. Knudson on behalf of First National Bank. Good morning.

Knudson: Good morning your Honor. And thank you for indulging all of us in allowing us to have a larger court room so the people here can follow the arguments and the questions from the court. My name is Scott Knudson. My client is the First National Bank of Milaca. It is a family owned Bank in Milaca, the county seat. It has a branch in Isle, Minnesota. Approximately one-third of its business, including the Isle Branch, lie within the disputed area. It does business with Band members, it owns property in the disputed area and has security interests from mortgages and real estate deals in the disputed area. The decision below turns out on both standings and rightness grounds and I believe we can demonstrate in the posture of this case that the Bank has shown adequate injury in fact to concrete actual injury to its property interests given the fact that we are the nonmoving party we are entitled to all reasonable inferences in our favor in the record before the court below. In that record in front of the district court there was adequate evidence from which the court could have held and should have held that we have established injury of fact. First example is the first Allen affidavit which was filed as part of our Motion to intervene in this case. Mr. Allen testified in his affidavit that this controversy the assertion of jurisdiction over the 1855 reservation territory and over the Bank will depress the Bank property values. In fact there is no dispute, I think, the Band is asserting regulatory jurisdiction over the 1855 reservation boundary. It has an elaborate set of statutes that on the face say

Honor: But has the Band taken any action to enforce these regulations. And I am talking about someone who was not acquiescing in that maybe doing business with the Band.

Knudson: What the Band asserts is that they assert the authority to regulate all people who do business with Band members. Now I try to evocate on that, but that is testimony of Molly Big Bear in her deposition.

Honor: Well, I understand that, I read that where they assert that they have the right to do it, and assert that they have passed these regulations, but have they attempted to enforce them?

Knudson: As they sent letters to various area businesses saying you are required to be licensed by

Honor: Is this the letter about 10 or 12 years ago?

Knudson: The one in 1992, yes. Now they say we only intend to regulate those businesses who do business with the Band itself.

Honor: Well were these letters sent to anybody that—any businesses that were not doing business or proposing to do business with the Band.

Knudson: I believe so, your Honor, but with respect to the Bank, that particular letter did not got to the Bank. But the Bank does business with Band members. The ordinances create a cause of action and right of a Band member to hail the Bank into tribal court if there is an alleged violation of the truth and lending act. For example, if the Bank loans

Honor: Why is it that then the time to litigate this. If the Band would ever haul you into court whether it is a tribal court or a federal court or state court—that's the time you litigate this.

Knudson: Sometimes its appropriate—the Bank would prefer the forum to be federal district court rather than tribal court.

Honor: Well obviously you could and if you were hauled into the tribal court, one option would be to run into federal court and file your declaratory judgment action then.

Knudson: I—that would be one option. I am not sure what the outcome of that, I haven't analyzed the issue of whether a Federal Court—[taking over one another _____]

Honor: I don't either, but it is an option that that would be the timing of it. You would have a clear rightness, you would have a clear standing and the federal court would be much more likely to take jurisdiction. Why is that not the better avenue instead of having the district court now just doing this more in the hypothetical kind to look at and your lost value and your Bank building property

Knudson: There is nothing hypothetical about what Mr. Allen testified to in his deposition. These controversy and the fact that it has not been resolved affects the franchise value of his Isle Branch by $750,000. And that the Wagner affidavit and the Wagner report in particular which was before the district court and which the district court failed to address testified to diminution in value by using a comparable sales methodology of a _____.

Honor: Lets assume that the State of Minnesota or the County would take some action on the value of your property, what would be your revenue. What would be your remedy?

Knudson: If the State took action that impacted the value

Honor: Right, lowered the value of your building? For example: Say we're gonna build a landfill next to your Bank

Knudson: Well that I believe would be the Bolton case for example. And that court held that there was standing for the landowner to bring an action where what was claimed in that particular incidence was the County had hired a firm an environmental firm to determine what was the most appropriate place to site a landfill in the county and the property owner that was adjacent to the location that was recommended said wait I want to build a residential development here. There was no landfill, there were no plans to build a landfill, it was

Honor: Well I think what the point is your cause of action is an inverse condemnation—Correct?

Knudson: Yes, it would be a precise service.

Honor: The ___ that you are arguing here is that the Band has devalued your property you cannot bring an inverse condemnation if they devalue your property against the Band because you don't recognize it as the governing authority. Is that what you are saying?

Knudson: Correct and we would be forced to go to tribal court and we would be forced to litigate in a forum we don't think has any jurisdiction over us in the first instance that is sort of the Baker electric type case. Where this court said that there it was an ordinance regulating the provisional electrical services. The issue there the tribe said you can't bring this case until the tribe officers had acted. And the court rejected that argument out of hand and said that if there is no reservation there is no authority to enact this ordinance and we can hear this case now. There is standing from this utility to bring that action. I think we fall within the ambient of the Baker Electric case. Well also the Mille Lac's decision from 1993 which you pointed out in earlier questioning that the precise issue of standing as standing was not addressed if you look at Laid Law decision of the Supreme Court this recent decision there they reversed determination that the case was moved and having found realizing that the case was not that the promise to comply wouldn't move the case they also said were duty bound in sense to find that we have that plaintiffs in that case the environmental groups had standing to bring the case in the first instance. And so I think Mille Lacs is still good authority for the proposition that a property owner who is subject to a claim or right by an Indian Band in that case to hunt or fish on someone's property here it is to say we can regulate anybody who is within the boundaries of a ___ Indian reservation has standing to bring an action to contest the authority. At the end of the day—my light is on—so I would like to wrap this up quickly, because I ___ time for rebuttal—we in a situation were there an assertion of

sovereign authority over people within the disputed area and although you might say Mexico still claims Texas and the Band claims its reservation, the Band has a government right in that area, it has a tribal police force in that area, ____ pend a decision they can escort you out

Honor: My Mexico Texas is a bad analogy. But I mean—the point is that the people will always, that there is always somebody out there that claims that they own more land than may be they really do.

Knudson: This is instance the claim is very precisely, they have a stack of ordinances that high, they articulated in their annual Band addresses to members we are going to get this reservation back and they really mean it. They are on a considered path to achieve that purpose—the effort with the EPA for treatment as a state status, it is just other evidence of their effort in other forums to say we have this reservation and we intend to exercise our authority to do that. Here they are saying that we don't want to. But I can't see how they can maintain inconsistent positions in these two tribunals and you should hold them to the position they take in front of the EPA in this case.

Honor: Thank you very much Mr. Knudson. Mr. Slonum. Good morning. {____}

Slonum: For the record my name is Mark Slonum. I am representing the defendants who are five elected officials of the Mille Lacs Band of Ojibeway. There are four points that we think are central to the resolution of the appeal which I would like to touch on on the outset and then go through the central arguments. First although the challenged Band laws that both Mr. Tobin and Mr. Knudson address were enacted over a decade ago, some over 20 years ago, none of those laws have ever been applied by defendants to the county or the Bank and there is no threat from the defendants to apply those laws to the county or the Bank today or at any time in the future.

Honor: Well they just stood up here and said they have a few incidents when they did. What does the record show? You are more familiar with it then any of us are, they rattled off four or five incidents that were before the district court and they say they have one or two more since then

Slonum: The first one that Mr. Tobin mentioned involved Dr. Schroeder. And that was a situation which involved application of a state law that applies statewide inside and outside reservations that prevents disturbing area burial grounds or any burial grounds. The tribe was involved in that case in the application of the state law by the county and state archeologist. And if you look at Mr. Schroeder's affidavit he says that clearly that what he objected to was that the tribe was able to influence the application of the state law by the state and the county, not that the tribe insisted on its own permit, there is all the correspondence regarding that matter is in our appendix, I think it about 153 or so

Honor: So you are saying that the tribe was not trying to enforce its own regulations or laws.

Slonum: That is correct your Honor. What the tribe was doing in that case was assisting in the enforcement of state law and there was a dispute with the Schroders and the Schroders may have been right, the Band may have been right, I don't know who was right on whether there were burial grounds there or not. But the point was that this was an application of state law, not Band law and Mr. Schroeder makes that pretty clear in his declaration or in his affidavit.

Honor: Why don't you quickly go through the others.

Slonum: Second one—Mr. Tobin all he said was a road permit. Um I think what that refers to is the Band issues archeological permits to people who want to do archeological research and a county consultant on one occasion applied voluntarily for a Band permit and the Band issued it. The Band's policy is not to require those permits from non-Band

members on non-Band lands. It enforces the permit requirement only against its own members and on its own lands.

Honor: The land _____ are not disputed.

Slonum: Correct. On that particular instance

Honor: Is there some logic to the fact that these are remains are of forefathers or ancestors of the Band so maybe they have a special interest in them?

Slonum: Yea, I mean they have a strong interest in remains on the reservation and in this area. And they work with archeologists off the reservation in nearby areas as well because they have an interest in the history and in the treatment of their people. The third thing that was mentioned was the EPA treatment as a state claims and the tribe has applied for treatment as a state from EPA. That is under certain environmental laws tribes can apply for authority to be treated as a state for purposes of developing regulations. The farthest the Band ever got was under the safe drinking water act there is a problem for regulating underground injection control wells. The Band applied for treatment as a state, it was for the whole reservation, it said to EPA it thought it had authority to implement the program throughout the reservation, EPA agreed, but it never developed the regulations. Instead it sat down with the State of Minnesota, the Minnesota Pollution Control Agency and EPA and developed a memorandum of agreement where EPA continues to run that program, just as they do everywhere else in the state.

Honor: How long ago was that?

Slonum: Um, I think 1998 is what comes to mind—that period—so about five years ago. The Band has not gotten treatment as a state for purposes of developing any other regulations and it hasn't developed the regulations either in the UIC area or any area.

Honor: Your argument on standing and rightness would you stand here and represent to us that if the Band ever did try to enforce some of the rules and regulations against the Bank or county citizens or something like that that would trigger standing and rightness for that individual matter.

Slonum: If the assertion was based on the existence of the reservation. If the Bank was doing business with a Band member who lived on trust lands, for example, you might say

Honor: Assuming this was outside the Band but within the reservation—they tried to enforce some rule or regulation against a non-indian—I don't know whomever, but that would raise the issue.

Slonum: Absolutely. Not waiving defenses like sovereign immunity or you I don't know what defenses might be available

Honor: Right or wrong there would be a ___

Slonum: But there would be a controversy. There would an article 3 case for controversy in that case that is not present in this case.

Honor: So that if the Band started applying some of its rules and regulations against the Bank on loans and or lets say zoning on real estate that would trigger

Slonum: that would trigger an Article 3 case for controversy. Yes your honor.

[Judge 2?] ___ the Bank that the Bank owns is that just the existence of these ordinances and a presents a threat that they would some day be enforced and this inhibits and injures the Bank in its doing business on making loans and so on, what do you say to that, isn't that enough to bring standing

Slonum: Well the record doesn't support the later part of that. There is no allegation and there is no evidence in the record that the Bank has done anything different in the way it

conducts its business because of these Band ordinances. Mr. Allen doesn't say in his affidavits that we refrain from issuing loans, or we've been reluctant to accept these deposits, or we've done anything different than what we would otherwise do. What he says in his affidavit is that we do a tremendous amount of business within the reservation. He doesn't say that they have been hindered by Band laws and he also doesn't say that now that we are aware of this issue that we're going to stop. That we are going to do something different in the future. There is no evidence of any of that here. And the law is very clear, both the Supreme Court's cases and this court's cases that the mere existence of a statute is not enough to create standing, you need both a realistic threat of enforcement and some coercive effect on the plaintiff, that's the injury that somehow the existence of the statute has had some coercive effect on you and there is no evidence of that in this case by the county or the Bank.

Honor: Why is this not like the old like the old tried and true quiet title action there is a cloud in the title of the Bank's property and under the old rules I assume Minnesota has added that you can go in and the court has jurisdiction to clear the title of the land.

Slonum: Well the first problem is that there is no cloud on the title. Even if the Band succeeded in establishing the existence of this reservation, it doesn't affect anybody's title to the property. There are reservations all over this country who have non-indian fee-owned land within them and people buy that land and they sell that land and they mortgage it and they lease it and they trade it and the fact that it is in the boundaries of the reservation doesn't affect title to the property at all. That is—the title issue is a distinct issue from the question of whether it is within the outer boundaries of an Indian reservation. So it is not a quiet title action in that sense.

Honor: Than what about my analogy to an inverse condemnation. They got, somebody is—if truly you have a governing body being the Band, the tribe, and their actions have devalued someone's property in any other governmental entity you can bring an inverse condemnation action. You may not win, but you can bring it. They've said that is to devalue—Your action is to devalue their property. Why isn't that analogy to an inverse condemnation hold true?

Slonum: There I think the problem is lack of evidence to show that there has been any devaluation. One – I think one of the subtext in this case is that the plaintiffs would like you to believe that if somebody says your property is on a reservation that's enough to say it has been devalued that there is some kind of stigma being on an Indian reservation. There is no evidence in this record to support that.

Honor: ___ the Allen affidavit. What does it contain.

Slonum: The Allen affidavit says that if the Band prevails in this case and establishes its authority to regulate the Bank then it will depress the value of its property. The Allen affidavit does not say there has been a present affect on the Band's property. Mr. Allen did not make that allegation until

Honor: Is the Band attempting to regulate the Bank?

Slonum: It is not. The Band is not attempting to anything to the Bank. The Band has never applied any of its laws to the Bank. It never threatened to apply any of its laws of the Bank. No Band member has ever sued the Bank in Band Court, there is no threat of any lawsuit in Band Court against the Bank. The Band has had virtually no contact with the Bank until the Bank sued it in this case. The evidence on devaluation came from Mr. Wagner. Mr. Wagner didn't do any market analysis. The only evidence in this record that talks about what are property values within the reservation area is from Mr. Quartro, the County Commissioner, who testified that property values are going up and they are

following the county-wide trend. That there has been no difference of property value within the reservation area and off the reservation in recent years. They are all going up and they are following the same trend. There is no other analysis of market or property values anywhere in this record. What you have

Honor: Other than the experts just throwing out their theories—did anybody do a analysis of comparables. I assume you have comparable farms or property on one side of the road that is in the reservation and on the other side of the road it is outside the reservation. Did anybody present any evidence like that?

Slonum: Nothing like that was present to the District Court. Nothing like that was presented to the district court. And the only evidence, the only submission to the District Court was from plaintiffs on this point was from Mr. Wagner who said that you know I have heard concerns about title something which nobody here contends is really affected, and therefore I think property values have been devalued. And the District Court said that's not sufficient on summary judgment to establish an issue for trial. _____.

Honor: The issue is not title. The issue is who has ultimate right—who has the right to regulate the property, is that it?

Slonum: That is getting there, but we explained that even if the reservation exists, the Band has very little regulatory authority over non-indians within the reservation. There have been a series of Supreme Court cases in the last 20 years that have addressed tribal authority over non-indians within a reservation and those cases are not expanding tribal authority. They started by saying you have no criminal jurisdiction over non-indians, then they said in general you have no civil jurisdiction over non-indians, they've said that on non-indian lands there is only one case that recognizes any type of civil jurisdiction and that circumstance doesn't prevail in Mille Lacs

Honor: Is that true even on the reservation?

Slonum: These are all on reservation cases. That is what—there are reservations all around the country, again like Mille Lacs where you have significant non-indian populations and this issue has come up well what even accepting that the reservation exists what kind of authority does the tribe have over non-indians on the reservation. And it has very little authority. It doesn't have criminal authority, and it doesn't have civil authority except in some very narrow circumstances. And what the Mille Lacs Band has said is our statutes don't purport to exercise authority that we don't have under federal law and we are not as a practical matter asserting authority over non-indians. It is not what we are about now. We are interested in building up this reservation economically, we are interested in regulating our own people and governing ourselves, but we are not interested in regulating non-indians. And they haven't done that.

[Judge 2?] ____ quivocal to this case the tribe is not attempting to assert—I mean all these things are on the books so to speak but the tribe is not attempting to assert regulatory jurisdiction over non-indians to the extent it has any authority to regulate non-indians on reservation lands are you telling us that it is not attempting to exercise that authority over non-indians with ____

Slonum: that is correct. The only regulation of non-indians is non-indian business who want to do business with the Bands. In order to maintain the integrity of the gaming enterprises the Band has to know who they do business with and so they require license applications, they require background information for larger contractors, they charge a license fee for part of that process and they would do that regardless of the outcome of this case on the merits and if this case went forward on the merits and the courts said the reservation doesn't exist they would continue to operate that licensing program exactly the way they are operating it today

and there is nothing in the decision about the reservation boundary which say to the Band you can't tell people who are trying to do business with you that they need to submit a license application. So that is not going to be affected, it is not going to change. That program has been in effect for eleven or twelve years, its never been applied to a non-indian business that doesn't do business with the Band. We have provided lists, we didn't have the name of every single person we sent those letters to, but we provided lists of hundreds of people that we did send them to. There is no evidence in the record that a single entity who doesn't do business with the Band or wasn't to seeking to do business with the Band got one of those letters. I just wanted to touch briefly on your decision in the Mille Lacs intervention case because it has been featured prominently here and make a couple of points. First of all as you remember that decision was in 1993, it was three years before this court decided that standing was prerequisite for intervention and in fact in the Moosaq decision in 1996 the court acknowledged that some of its prior cases it had ruled on intervention without considering standing and it cited the Mille Lacs case as one example of that. The intervention issue in that case was whether the counties that were seeking intervention and the landowners had an interest which might be impaired by the disposition of this case in their absence and all the court said was that their interest in property values was an interest which might be impaired if the Band were to prevail in that case. That was a case the Band initiated it was seeking a declaration of its hunting and fishing rights, it was seeking an injunction to prevent the interference of those rights by the state and the court said it did prevail in that situation the county and landowner interests might be affected. That is far different from the Article 3

[Judge 2] [not audible _____] necessarily consider standing.

Slonum: I don't that's the case. First of all the law

[Judge 2] Could we have granted the right to intervene if we hadn't considered standing?

Slonum: The law in this circuit didn't require it at the time you made that decision. First of all if you look at the Moosaq case three years later they said we haven't decided up until now whether standing is a prerequisite for intervention. The second thing, and I don't recall the names of the cases, but we've cited Supreme Court and Circuit Court cases in our brief that make it clear that on an Article 3 issue where subject matter jurisdiction issue a prior decision which does not address the issue is not binding precedent that even on the same facts there is jurisdiction in a latter case. Until the court focuses on the issue it doesn't have that kind of precedential value. And that only makes sense. Until you actually address the issue, can't be said to have decided the issue. In this case it is not enough for the plaintiffs to come to court and say if we lose this case on the merits we are going to be injured. Which is what Mr. Allen said in his affidavit which seems to be the thrust of a lot of this—is that if you actually decide the case on the merits and tell us that the reservation exists that's going to be really bad for us, their burden, particularly on summary judgment, was to produce specific facts showing that they have been injured or that there is eminent injury, one which is certainly impending, and they haven't done that. The final couple of points that Mr. Tobin mentioned, I guess I should just touch on those briefly, he mentioned a sewer agreement with the Band. It hasn't been argued, was never argued in the District Court, I don't know if it somewhere in the record, but it was never argued in district court. The Band is building a regional sewage treatment plant in cooperation with its non-indian communities in the area and there is a contract between the Band's subdivision that is building the plant and other municipalities for the treatment of sewage services. It doesn't have anything to do with the estab-

lishment of the reservation. It has to do with the Band's contract to provide sewer services and whatever the contract says about what law applies, that is a matter of contract between the parties, it is not a matter of reservation status. The other things that have been mentioned are things that are not in the record. And I guess I want to reiterate our position that we don't think it is appropriate to come to this court having failed to make a showing on injury in fact with the District Court and say now we have new stuff. When you hear from Mr. Tobin about what some EPA

Honor: I think that is a good argument, but there are a couple of things they are proposing that we could probably take judicial notice of because of they are things we take judicial notice of—

Slonum: You can take notice of legislative hearings and the stuff that happened in the Senate and you can take notice of that, but for Mr. Tobin to come here and say last week an EPA official went onto private property and said he was you know he was running some tribal program—and have you based—there is nothing in the record on that—I don't know what it is about—I need to know who the EPA official is

Honor: I seriously doubt that the court is going to consider that so

Slonum: And I think Mr. Allen's testimony that wasn't submitted to the District Court falls in the same category. They had a burden under Rule 56 to come forward with their evidence when we moved for summary judgment and to say well we didn't get around to it you know did Mr. Allen forget about the $750,000 loss, is that why he didn't present it then? It just doesn't make any sense.

Honor: Your time has expired, if you want to sum up—otherwise

Slonum: The only point I would make in summary is that these reservation boundary cases are extremely contentious , they are extremely expensive, they are very draining on the party's resources, this is not a situation to relax Article 3 requirements on. They weren't met here. Case should be dismissed. Thanks.

Honor: Thank you very much. Mr. Knudson, does Mr. Knudson have some time.

[background female says _____]

Honor: Okay you have one minute.

Yes your honor, I would like to clear up one statement in the record with respect to Mr. Sloan's argument, and that is refer this court to our reply brief, pages

Honor: That's right, you are Mr. Tobin, I'm sorry.

Tobin: Not a problem.

Honor: No, that is my fault, I apologize.

Tobin: I would like to refer this court to pages 20 and 22 in our reply brief. In those pages we point out that had the Band presented a representative expert for the testimony of Commissioner Corteou in the Bear deposition that the evidence would have shown that Mr. Corteou was of the opinion that reservation status has a 25% negative impact on real property and he cited a friend of his who in fact had given testimony to the senate select committee on Indian affairs on that very point. Having said that, I would like to close by saying we do not believe that our case is indistinguishable from *Rosebud* or *Newtown*. At the end of the day we have the same kind of standing because of the sovereign jurisdictional conflicts that are there. Secondly, we believe the district court should have adhered to the analysis of the Magistrate in this instance paid attention to the Mille Lacs decision of this court and granted the county and the Bank standing upon that basis and thirdly the conflict here is reservation boundaries.

It is not a specific underlying controversy any more than it was in *Newtown* or *Rosebud*. We have a legitimate controversy on reservation boundaries. The court should be asked to resolve the questions what was the intent of Congress or the Senate on those reservation boundaries when the passed the legislation that they did. That is a legal question, it is not hypothetical and it needs to be resolved by this Court. Thank you.

Honor: Thank you Mr. Tobin. Mr. Knudson.

Knudson: Thank you your Honor. I would like to point out that contrary to what Mr. Slonum is suggesting, there is evidence in the record that was before the District Court on which we were entitled to reasonable inferences in our favor that would support a finding of actual harm. I direct the Court's attention to Mr. Allen's first affidavit in paragraph 11-_____ the Bank's enforcement authority , the Band's assertion of regulatory authority over property the Bank owns or on which it holds a security interest will depress the market value of that property. No they do a song and dance about will depress is working in the future, but it is true that

Honor: The district court—there was a lot of conclusory statements and there weren't the backup data and the information that normally you would expect in an opinion

Knudson: We are in the middle of discovery, expert disclosures weren't yet required. The Band did not—at least had not objected to the evidence that had been tendered to the court—that was a question *sua sponte* from the court at the hearing. I see my time has expired, but I would like to explain that

Honor: Well why don't you sum up your—take your best point and sum

Knudson: All right, I would like to conclude with—two things—one is the Mille Lacs case decided in 1993 built on the precedent of United States Supreme Court in Valley Forge and that case has held that to all parties to that case have to have standing to be in that case and I find it very strange I think that this court would hold other contrary to that decision and finally even if you confirm the District Court the judgment in the law should be revised to be without prejudice.

Honor: Thank you every much. Again I thank you for your patience in waiting until now to hear this so we could use the bigger court room—it was very well argued. Briefs were well written and we thank you for your help and we will do the best job we can. Thank you.

APPENDIX J

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FIFTH DIVISION

CIV. NO. 02-407
JMR/RLE

COUNTY OF MILLE LACS,

Plaintiff,

v.

MELANIE BENJAMIN, individually and officially as Chief Executive, Mille Lacs Band of Chippewa Indians; HERB WEYAUS, individually and officially as Secretary/ Treasurer, Mille Lacs Band of Chippewa Indians; SANDRA BLAKE, individually and officially as District Representative, Mille LacsBand of Chippewa Indians; MARVIN BRUNEAU, individually and officially as District Representative, Mille Lacs Band of Chippewa Indians; and HARRY DAVIS, individually and officially as District Representative, Mille Lacs Band of Chippewa Indians,

Defendants.

COMPLAINT FOR DECLARATORY JUDGMENT

Plaintiff, for its cause of action against the above named Defendants, states and alleges as follows:

I

PRELIMINARY STATEMENT

1. This is an action by the County of Mille Lacs against individual officers and officials of the Mille Lacs Band of Chippewa Indians seeking a declaratory judgment that the exterior boundaries of the 1855 Mille Lacs Indian Reser-

vation were disestablished/diminished by specific federal treaties and statutes, as the United States Supreme Court has held. *United States v. Mille Lac Chippewas*, 229 U.S. 498, 507 (1913) ("the relinquishment of that reservation").

II

JURISDICTION AND VENUE

2. This Court has jurisdiction over the subject matter of this action under and pursuant to Title 28 United States Code § 1331. This is a civil action brought by a Minnesota County which arises under the treaties and agreements between the United States and the Mille Lacs Band, federal common law, and other federal statutes, including, but not limited to, the 1855 Treaty with the Chippewa (10 Stat. 1166), the 1863 Treaty with the Chippewa (12 Stat. 1249), the 1864 Treaty with the Chippewa (13 Stat. 693), the General Allotment Act of 1887 (24 Stat. 388), the Act of January 14, 1889 (25 Stat. 642) and the Act of May 27, 1902 (32 Stat. 245).

3. This Court has authority to issue a declaratory judgment pursuant to Title 28 United States Code § 2201 and § 2202, for the purpose of determining an actual controversy between plaintiff and defendants, as more fully appears below in Paragraphs 6-9, 12-14, 17, 20-28, 32-36, 38-40, 46, 48-60, 65-66, 74-75, and 77-80.

4. Venue is proper in this district under Title 28 United States Code § 1391(b) because all defendants reside in Minnesota and a substantial part of the events or omissions giving rise to this action occurred within this judicial district. The area which is the subject of this action is situated within this judicial district.

III

PARTIES

5. Plaintiff, County of Mille Lacs ("County"), is organized under and exercises government power and authority pursuant to and under the laws of Minnesota. Its government power and authority are exercised over the territorial boundaries encompassed within the County as established by Minnesota law.

6. Defendants Benjamin, Weyaus, Blake, Bruneau, and Davis are elected governing officials of the Mille Lacs Band of Chippewa Indians ("Band"), which exercises powers of tribal government. The headquarters of the Band is located at Vineland, Minnesota, within the County. The exercise of tribal power over non "Indian country" lands within the disestablished 1855 Mille Lacs Indian Reservation conflicts with the governmental power and authority of the County exercised under Minnesota law.

IV

GENERAL BACKGROUND

7. The controversy in this action centers around a question of federal law involving the status of the 1855 Mille Lacs Reservation, which lies primarily within the County. The County maintains that this 1855 Reservation has been disestablished/diminished by federal treaties and statutes. The Band disagrees. As a result, this case presents an issue of congressional intent (statutory construction).

8. The County also maintains that the United States Supreme Court squarely recognized this reservation disestablishment nearly a century ago. In 1912, the Band sued the United States for the fair market value of the 1855 Mille Lacs Reservation. *U.S. v. Mille Lac Band of Chippewa Indians*, 229 U.S. 498 (1913). In this *Mille Lac* litigation, the Band, the United States, and the United States Supreme Court all

agreed that the 1855 Mille Lacs Reservation had been disestablished. Unequivocal excerpts from the briefs of the Band and the United States in the Court of Claims and in the United States Supreme Court in support of this position are attached to this Complaint as REPRESENTATIVE EXCERPTS, Exhibit 1.

9. The Band disputes the position of the County regarding the status of the 1855 Reservation and, the Band now maintains, without support of precedent, that the original limits of the 1855 Reservation are still intact.

10. The sixty-one thousand (61,000) acre area of the 1855 Reservation in controversy is now primarily owned (approximately 75%) and populated (approximately 75%), by non-members of the Mille Lacs Band. (The south shore of Mille Lacs marks the north boundary of the 1855 Reservation). The cities involved are Isle, Wahkon and Onamia, and the three townships of Isle Harbour, South Harbour and Kathio, all within the County.

11. Today, the consequences of resurrected reservation status for any area with similar demographics would be staggering, as the United States Supreme Court has noted. *See* "justifiable expectations" recognized in *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 605 (1977) and *Hagen v. Utah*, 510 U.S. 399, 420-421 (1994).

12. In nearly a century, no court or agency recognized the 1855 Mille Lacs Reservation. Rather, the "reservation" or "Indian country" designations in the Mille Lacs area have been limited to informal references to several parcels of land held in trust for Band members or the Band, (most acquired subsequent to 1910). Accordingly, until recently, this rural area was not treated any differently than other non-reservation rural areas throughout the State of Minnesota.

13. Historically, in addition to the County, state agencies, the Office of the Attorney General and the Office of the

Governor for the State of Minnesota have supported this historical understanding and similarly maintained that the 1855 Mille Lacs Reservation has been disestablished/ diminished.

14. This case involves an ongoing violation of federal law. The County seeks only prospective relief to enforce federal law.

15. Tribal sovereign immunity does not extend to tribal officers allegedly acting in violation of federal law. The defendants cannot claim tribal sovereign immunity because the County has the right to sue tribal officials under the principles of *Ex Parte Young*, 209 U.S. 123 (1908). *Fond du Lac Band of Chippewa Indians v. Carlson*, 68 F.3d 253, 257 (8th Cir. 1995).

DISESTABLISHMENT BACKGROUND

16. The Mille Lacs Reservation was created in an 1855 Treaty. Treaty with the Chippewas, February 22, 1855 (10 Stat. 1165). In that 1855 Treaty, several smaller areas were reserved in common as reservations from a larger area that was ceded by the Minnesota Chippewa. One of the smaller areas reserved in common was the Mille Lacs Reservation ("1855 Reservation").

17. In the Treaties of 1863-1864, the Minnesota Chippewa (not just the Band) ceded all the 1855 reservations to the United States, including the 1855 Mille Lacs Reservation. The consideration promised was paid. The Minnesota Chippewa were to remove to a central area reserved in common. *DeCoteau v. District County Court*, 420 U.S. 425 (1975), *Rosebud Sioux Tribe v. Kneip, et al.*, 430 U.S. 584, 589-605 (1977), and *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998) (similar cessions).

18. Article 12 in these 1863-1864 treaties also granted to the Band, as a matter of "favor," a conditional privilege that

they "not be compelled to remove" from the ceded 1855 Mille Lacs Reservation as long as they did not "interfere with or in any way molest the persons or property of the whites." The Band later maintained this conditional privilege of occupancy preserved their interest in the 1855 Mille Lacs Reservation in its entirety, as if no cession had taken place in the treaties of 1863-1864.

19. In any event, in 1889 the Band formally agreed to forever relinquish the Article 12 conditional privilege of occupancy in the 1855 Mille Lacs Reservation to the United States, pursuant to the terms of the 1889 Act. Act of January 14, 1889 (25 Stat. 642).

20. Twenty years later, the Band filed suit against the United States in the Court of Claims of the United States. The Band maintained that the United States failed to provide proper compensation for the surrender of their Article 12 conditional privilege of occupancy to the 1855 Mille Lacs Reservation pursuant to the 1889 Act. The Band sued the United States for that compensation.

21. The United States Supreme Court held that the Band was entitled to additional compensation from the United States for the relinquishment of that conditional privilege, the "relinquishment" of the 1855 Reservation. *U.S. v. Mille Lac Band of Chippewa Indians*, 229 U.S. 498, 507 (1913).

22. In the process, the United States Supreme Court recognized that the 1889 agreement contained an "express" relinquishment of the lands in the 1855 Mille Lacs Reservation, quoting the agreement where the Band did "forever relinquish to the United States their right of occupancy on the Mille Lacs Reservation." Id. at 504-505. Act of January 14, 1889

(25 Stat. 642). As a result, the United States Supreme Court succinctly stated that the Mille Lacs Reservation had been relinquished:

> The commission, the Secretary of the Interior, and the President, in seeking, obtaining and approving *the relinquishment of that reservation*, all treated it as within the purview of the act, and the Mille Lacs did the same.

U.S. v. Mille Lac Band of Chippewa Indians, 229 U.S. 498, 507 (1913) (emphasis added).

23. The United States Supreme Court recognized and expressly relied on the assumption of the Band regarding the extinguishment of the Mille Lacs Reservation pursuant to the terms of the 1889 Act, and the recognition of that concession by the United States. Id. In this respect, the 1889 Act addressed and settled the conditional privilege of occupancy claim (reservation status issue) of the Mille Lacs Band that was dependent on Article 12, and the United States Supreme Court so held. Id.

24. As noted above, for nearly a century, no one, including the Band, suggested that the claim of reservation status should apply to the 1855 Mille Lacs Reservation.

25. Since that time, several generations have relied on the understanding clearly reflected in the holding of the United States Supreme Court in this 1913 *Mille Lac* case.

26. Accordingly, the "reservation" or "Indian country" designations in the Mille Lacs area have been limited to informal references to several parcels of land held in trust for Band members or the Band.

27. Under these circumstances, the general rule that the off-reservation activities of Indians are subject to a State's nondiscriminatory laws, absent express federal law to the contrary, has been observed and applied. See, *e.g., Oregon Dept. of Fish and Wildlife v. Klamath Tribe*, 473 U.S. 753

U.S. 753, 765, n. 16 (1985); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 335, n. 18 (1983).

28. As noted above, a reservation status designation for this 1855 area would conflict with justifiable expectations.

29. The actual controversy in this case regarding the reservation status of the 1855 Mille Lacs Reservation causes conflict and uncertainty affecting the lives and property of County residents on a daily basis.

RESERVATION STATUS ("Indian country")

30. Any determination regarding Indian reservation status, (i.e., "Indian country," 18 U.S.C. § 1151(a)), in this or any other area is significant for the Indian tribe, the United States and the state and local governments.

31. Title 18 U.S.C. § 1151(a) broadly defines "Indian country" as "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation,". . .

32. For this reason, in recent years, the United States Supreme Court has expended an extraordinary amount of effort in order to authoritatively resolve the precise issue presented in this case: conflicting positions regarding the reservation status of an area under 18 U.S.C. § 1151(a). *Seymour v. Superintendent*, 368 U.S. 351 (1962), *Mattz v. Arnett*, 412 U.S. 481 (1973), *DeCoteau v. District County Court*, 420 U.S. 425 (1975), *Rosebud Sioux Tribe v. Kneip, et al.*, 430 U.S. 584 (1977), *Solem v. Bartlett*, 465 U.S. 463 (1984), *Hagen v. Utah*, 510 U.S. 399 (1994) and *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998).

33. As noted above, the "reservation status" or "Indian country" designation in the Mille Lacs area for the past century has been limited to informal references to small acreages held in trust for the Band members or the Band.

34. Nevertheless, in recent years the Band has formally maintained that the 1855 Mille Lacs Reservation continues to exist.

35. Since that time, the Band has sought to rely upon 1855 Reservation status in most of its dealings with the Federal Government and others.

36. To emphasize this point, in the annual State of the Band address on January 8, 2002, the Chief Executive of the Band, Melanie Benjamin, told Band members that efforts to challenge the reservation status of the 1855 Reservation would force the Band to "fight for survival" in the "war to survive" the "biggest threat" that the Band now faces. *Mille Lacs Band CEO talks tough in State of Band*, Mille Lacs Messenger, Jan. 16, 2002, at 1.

37. Non-Indians are also of the view that reservation status is a very serious and unsettling issue. Some have publicly acknowledged considering selling their property and moving elsewhere. Others, on both sides, have discussed the issue in terms that increase divisiveness and animosity, creating an atmosphere of extreme distrust and social unrest in this rural area.

38. The jurisdictional issue of reservation status presented in this complaint should be viewed from the perspective highlighted by the following conflicts in this complaint and in light of the other pertinent information noted herein.

RECENT CLAIMS OF RESERVATION STATUS

39. The extent that the government of the Band now relies on the reservation status of the 1855 Mille Lacs Reservation, as well as the conflict generated as a result of that reliance, is beyond dispute and can be summarily noted.

A. The official web site of the Mille Lacs Band succinctly asserts that:

> The boundaries of the Mille Lacs Reservation cover 61,000 square acres in Mille Lacs County.

Mille Lacs Band of Ojibwe, http://www.millelacsojibwe.org/ (February 3, 2001).

B. The volumes of the "Mille Lacs Band Statutes Annotated," MILLE LACS BAND STATUTES Annotated, Volume 1, Constitution and Bylaws of Minnesota Chippewa Tribe, Titles 1 to 15; Volume 2, Executive Order and Commissioner's Orders, Titles 16 to 25 (MILLE LACS BAND OF OJIBWE INDIANS, 1996), are replete with references to the 1855 Treaty area.

Two of the most comprehensive statutes unequivocally assert jurisdiction over "*all lands within the exterior boundaries of the Mille Lacs Reservation*"... "*as established by the treaty of 1855*": (and, over all "*non-Indians*," "*political subdivisions*" and "*their officers and agents*"):

> 1. ENVIRONMENTAL PROTECTION CODE, TITLE II . . .
>
> § 9. Jurisdictional authority . . .
>
> (c) The Non-Removable Mille Lacs Bands of Chippewa Indians shall exercise concurrent environmental jurisdiction with the United States of America over:
>
> (1) *all lands within the exterior boundaries of the Mille Lacs Reservation and Sandy Lake Reservation as established by the Treaty of 1855* . . .
>
> (e) *The exercise of civil jurisdiction of the Non-Removable Mille Lacs Bands of Chippewa Indians over non-Indians, in environmental protection causes of action shall exist to the extent authorized by the laws of the United States of America.* The criminal

jurisdiction of the Non-Removable Mille Lacs Bands of Chippewa Indians shall not extend to non-Indians.

(f) *The jurisdiction of the Non-Removable Mille Lacs Bands of Chippewa Indians shall extend to all persons, political sub-divisions and their officers and agents, public or private corporations, associations, partnerships and any other individuals or entities who shall violate the environmental protection laws of the Band within the exterior boundaries of the Mille Lacs and Sandy Lake Reservations or on lands held in trust or fee status in the name of the Band, as authorized pursuant to the laws of the United States of America.*

§ 10. Judicial authority

(a) *The Court of Central Jurisdiction shall have original jurisdiction over any civil or criminal violation of the environmental protection laws . . .*

Mille Lacs Band Statutes Annotated, VOLUME I at 361-363 (emphasis added) (Excerpts attached as Exhibit 2).

2. NATURAL RESOURCE PROTECTION CODE, TITLE II

§ 2001. Definitions

(n) Mille Lacs Reservation-shall mean *all land within the exterior boundary described in the Treaty of 1855*, to wit:

"*the following fractional townships, viz: forty-two north, of range twenty-five west; forty-two north, of range twenty-six west; and forty-two and forty-three north, of range twenty-seven west; and also, the three islands in the southern part of Mille Lacs, exterior boundary of Sandy Lake Reservation as described in the Treaty of 1855, all contiguous waters, and all other trust properties under the jurisdiction of the Mille Lacs Band, its enrolled*

members, and of the Minnesota Chippewa Tribe and delegated to the Non-Removable Mille Lacs Band of Chippewa Indians." . . .

§ 2002. Powers of Commissioner of Natural Resources

The Commissioner of Natural Resources shall have powers of regulation over *all matters of land, air, water, environmental protections and anything and everything related to the conservation and protection of natural resources under the jurisdiction of the Mille Lacs Band of Chippewa Indians.*

(a) He shall have *power to open and close all seasons for hunting, fishing, trapping, and the gathering of wild rice* by the issuance of a Commissioner's Order with the concurrence of the Spiritual Advisor on all matters related to his duties.

(b) He shall be responsible for the development of a natural resource management plan and *certify to the feasibility of all economic development plans which involve the natural resources* with the concurrence of the Spiritual Advisor. . . .

(e) The Commissioner may *do all things deemed by him as desirable in the preservation, protection and propagation in their natural state of all desirable species of wild animal, bird, or fish* upon the concurrence of the Spiritual Advisor.

Mille Lacs Band Statutes Annotated, VOLUME I at 394-398 (emphasis added). Excerpts attached as Exhibit 3.

Other references to the 1855 Mille Lacs Treaty in the Mille Lacs Band Statutes Annotated include, VOLUME 1 at 362, 395, VOLUME 2 at 129, 374, 379, 392-393, 400-401, 412-413, 458.

40. These and other Band "statutes" directly implicate, affect and complicate the ordinary application of federal, state, local laws and ordinances, throughout the 1855 Mille Lacs area. Standing alone, that is clearly a significant and material fact in support of this declaratory judgment.

41. Moreover, the reach of these statutes far exceeds the scope of the jurisdictional ramifications traditionally associated with "reservation status." As noted, the statutes of the Band explicitly assert tribal jurisdiction *over all non-members (including political subdivisions), on all lands, including fee lands, and in "all contiguous waters"* (which would include, of course, *Lake Mille Lacs*). The chilling implications of this "statutory" claim with reference to the abrogation of the constitutional rights of the Mille Lacs residents and other non-Band members in the area are a source of grave concern.

42. In this instance, the position of the County cannot be over stated. The United States Supreme Court has repeatedly described tribal courts as unfamiliar courts. In addition, the Court has made clear that *non-Indians subject to the jurisdiction of tribal courts are thereby deprived of all of their constitutional rights* (with the exception of habeas corpus). Understandably, constitutional rights are very important, as a practical matter, to the County and the residents and others that live and visit in this area.

43. Last term, Justice Souter aptly summarized the problems that the County has with tribal jurisdiction over non-Indians and the Band's statutory claim that this power should extend throughout the 1855 Mille Lacs Reservation. *In concurring in Nevada v. Hicks,* 533 U.S. 353, 121 S.Ct. 2304 (2001), *Justice Souter squarley addressed this issue in terms*

that unequivocally support the appropriateness and the urgency of a declaratory judgment with reference to the status of the 1855 Mille Lacs Reservation.

> [1]. The ability of nonmembers to know where tribal jurisdiction begins and ends, it should be stressed, is *a matter of real, practical consequence* given '[t]he special nature of [Indian] tribunals,'. . . which differ from traditional American courts in a number of significant respects. To start with the most obvious one, it has been understood for more than a century that *the Bill of Rights and the Fourteenth Amendment do not of their own force apply to Indian tribes*. . . . ('Indian tribes are not states of the union within the meaning of the Constitution, and the constitutional limitations on states do not apply to tribes'). Although the Indian Civil Rights Act of 1968 (ICRA) makes a handful of analogous safeguards enforceable in tribal courts. . . 'the guarantees are not identical'. . . and there is a 'definite trend by tribal courts' toward the view that they 'ha[ve] leeway in interpreting' the ICRA's due process and equal protection clauses and 'need not follow the U.S. Supreme Courts precedents jot-for-jot'. . . In any event, a presumption against tribal-court civil jurisdiction squares with one of the principal policy considerations underlying *Oliphant*, namely, an *overriding concern that citizens who are not tribal members be 'protected from unwarranted intrusions on their personal liberty*,'. . .
>
> [2]. Tribal courts also differ from other American courts (and often from one another) in their structure, in the substantive law they apply, and in the independence of their judges. Although some modern tribal courts 'mirror American courts' and 'are guided by written codes, rules, procedures, and guidelines,' tribal law is still frequently unwritten, being based instead 'on the values, mores, and norms of a tribe and expressed in its

> customs, traditions, and practices,' and is often 'handed down orally or by example from one generation to another.'. . . The resulting law applicable in tribal courts is a complex 'mix of tribal codes and federal, state, and traditional law,'. . . which would be *unusually difficult for an outsider to sort out.*
>
> [3]. *Hence the practical importance of being able to anticipate tribal jurisdiction by reference* to a fact more readily knowable than the title status of a particular plot of land. One further consideration confirms the point. It is generally accepted that *there is no effective review mechanism in place to police tribal courts' decisions on matters of non-tribal law*, since tribal-court judgments based on state or federal law can be *neither removed nor appealed to state or federal courts*. . . . The result, of course, is a risk of substantial disuniformity in the interpretation of state and federal law, a risk underscored by the fact that '*[t]ribal courts are often subordinate to the political branches of tribal governments*,'. . .

Hicks, 121 S.Ct. 2304, 2323 (2001), Souter J., concurring, (citations omitted) (emphasis added).

44. The organization, limitations and authority of the tribal court of the Band place that tribal court within purview of the concerns set forth by Justice Souter.

45. Finally, any suggestion that *Nevada v. Hicks* resolves the cause for the concern of the County recounted in this opinion would be disingenuous. The *Hicks* opinion makes clear that the United States Supreme Court has only resolved some of the significant issues. *Id.*

46. Moreover, efforts are already underway to undermine *Hicks*. *Hicks* is the focus of the 27th Annual Indian Law Conference sponsored by the Federal Bar Association, in April, 2002: "Reaffirming Tribal Sovereignty in an Era of Judicial Activism." The conference will be evaluating

various tribal proposals for a "congressional fix" to give tribes increased civil and criminal jurisdiction over non-Indians within all Indian country. (*See also*, *Duro v. Reina*, 495 U.S. 676 (1990), in which the United States Supreme Court extended the rule of *Oliphant* to deny tribal courts criminal jurisdiction over nonmember Indians. In the end, Indian tribes convinced Congress to pass a statute expressly granting tribal courts such jurisdiction. *See* 105 Stat. 646, 25 U.S.C. § 1301(2)).

47. Of course, everyone familiar with the history of Indian reservations and "Indian country," realizes that lives and property in these areas have too often been subject to the changing whims of congressional discretion. In fact, this is one of the realities that prompted the filing of this complaint for a declaratory judgment to decide the extent of Indian country in the County.

ADDITIONAL CONFLICTS REGARDING RESERVATION STATUS

PUBLIC LAW 280

48. Conflicts over reservation status in the 1855 Mille Lacs area in federal, tribal, state and local laws would be even more pronounced without the statutory provisions of Public Law 280 that provide for limited state jurisdiction in "Indian country" in the State of Minnesota. Pub.L. No. 83-280, 67 Stat. 588-89 (1953) (codified as amended at 18 U.S.C. § 1162, 25 U.S.C. §§ 1321-24, 28 U.S.C. § 1360). As the Minnesota Supreme Court noted in *State v. Stone*, 572 N.W.2d 725 (Minn. 1997), Public Law 280 granted the State of Minnesota broad criminal and limited civil jurisdiction over all "Indian country" within the state. For example, all state crimes committed by Indians or non-Indians within Indian country in Minnesota are prosecuted by the state and local government officials without reference to reservation status.

49. Nevertheless, as the Minnesota Supreme Court also held in *Stone*, Public Law 280 does *not* provide for state and local jurisdiction over members of Indian tribes who commit violations of civil regulatory laws in Indian country. Examples of traffic related civil regulatory laws of this nature listed by the Minnesota Supreme Court include: failure to provide motor vehicle insurance, proof of insurance, driving with expired registration, driving without a license, driving with expired driver's license, and speeding and so forth. *Stone*, at 728. This exception involving public safety in the County is tangible and significant.

50. Other civil regulatory laws, though not enumerated, are clearly within the scope of *Stone*. Accordingly, the conflict over the reservation status of the 1855 Mille Lacs Reservation also routinely undermines the enforcement of these civil regulatory laws. Band members can be prosecuted, if at all, only in tribal court.

51. In addition, the United States Supreme Court has cast substantial doubt on whether Public Law 280 authorizes the application of *any* local laws on Indian reservation, criminal or civil. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 212 n.11 (1987) ("[I]t is doubtful that Pub. L. 280 authorizes the application of *any* local laws to Indian reservations"). The harmful effect of limiting the application of all local law in the area in controversy is clear and substantial.

52. The general prohibition against the application of other civil laws in Indian country with reference to Band members, as well as some of their property, has not been altered by Public Law 280. The United States Supreme Court made this point clear in 1976 in *Bryan v. Itaska County, Minnesota*, 426 U.S. 373 (1976).

ADMINISTRATIVE MATTERS

53. The extent of the reliance of the Band on their position regarding the status of the 1855 Mille Lacs Reservation, as well as the conflict and additional disputes generated as a result of that advocacy, is beyond dispute and can also be summarily referenced in administrative proceedings and related matters.

A. The request of the Minneapolis Area Director, Bureau of Indian Affairs (initiated by the Band) that the Office of the Field Solicitor, Minneapolis/St. Paul, Minnesota, United States Department of the Interior, issue a letter opinion in support of a recognition of the 1855 Mille Lacs Reservation, and the Band's further submission in support of that position. Opinion request reference in letter opinion for the Field Solicitor to Minnesota Area Director dated February 28, 1991.

B. The letter opinion for the Field Solicitor, Minneapolis/St. Paul, Minnesota, in response to the request of the Area Director, in recognition of the Band's position regarding the reservation status of the 1855 Reservation. Id. (Incredibly, the letter opinion omitted the 1913 *Mille Lac* case).

ENVIRONMENTAL PROTECTION AGENCY

C. The Band's recent submission (last year and this year) that the Environmental Protection Agency of the United States rely on this letter opinion for the Field Solicitor and consider the 1855 Treaty area as an Indian reservation, and the Band's further submission in the pending appeal in support of that position. *In re: Vineland Sewage Lagoons, NPDES Permit No. MN 0058629-2, Mille Lacs Wastewater Treatment Facility, Vineland, Minnesota*, Environmental Appeals Board, United States Environmental Protection Agency, Wash-

ington, D.C. (NPDES Appeal Nos. 01-16 through 01-23) (pending). The County objected and opposed the Band's claim regarding the reservation status of the 1855 Mille Lacs Reservation. Id.

D. The subsequent formal recognition (last year) by the Environmental Protection Agency of the Band's position regarding the reservation status of the 1855 Reservation. The County objected and opposed the Environmental Protection Agency's recognition of the reservation status of the 1855 Mille Lacs Reservation in the appeal. *Id.*

BUREAU OF INDIAN AFFAIRS

E. The Band's recent submission (last year) that the Bureau of Indian Affairs also rely on this letter opinion for the Field Solicitor in another matter and consider the 1855 Treaty area as an Indian reservation in conjunction with the Band's request to place additional fee land in trust status, and the Band's further submissions in the appeal in support of that position. *County of Mille Lacs, State of Minnesota v. Larry Morrin, Midwest Regional Director, Bureau of Indian Affairs*, United States Department of the Interior, Interior Board of Indian Appeals (Docket No. IBIA 02-1-A) (pending). The County objected and opposed the Band's claim regarding the reservation status of the 1855 Mille Lacs Reservation in the appeal. Id.

F. The formal recognition by the Bureau of Indian Affairs of the position of the Band regarding the reservation status of the 1855 Reservation (last year). Id. The County objected and opposed the position of the Bureau of Indian Affairs regarding the reservation status of the 1855 Mille Lacs Reservation in this same appeal. *Id.*

DEPARTMENT OF THE ARMY, CORP. OF ENGINEERS

G. The submission of the Bureau of Indian Affairs, at the Band's request, that the Department of the Army, St. Paul District, Corp. of Engineers, recognize the 1855 Reservation as an Indian reservation, together with the map of the Band detailing the 1855 Mille Lacs Reservation boundaries and the status of lands at issue (1999). In order to preserve the reservation status issue, the County notified the Bureau of Indian Affairs and the Band that it disagrees with the position of the Band with reference to the 1855 Mille Lacs Reservation.

H. The formal recognition by the Department of the Army, St. Paul District, Corp. of Engineers, of the Band's position regarding the reservation status of the 1855 Reservation and the routine implementation of that 1855 Reservation recognition in related projects administered throughout the area by the Corp. of Engineers (1999).

I. Increased development and improvement activity throughout the contested area insures this conflict on a continuous basis. In order to preserve the reservation status issue, the County has notified the Department of the Army, St. Paul District, Corp. of Engineers that it disagrees with the position of the Corp. of Engineers with reference to the 1855 Mille Lacs Reservation.

ADDITIONAL CONFLICT REGARDING RESERVATION STATUS

54. In pursuing their claim to resurrect the 1855 Mille Lacs Reservation, the Mille Lacs Band has also recently pressed for Memoranda of Understandings with agencies,

including the Minnesota Pollution Control Agency. In each instance, the Band claimed authority dependent upon the existence of the 1855 Mille Lacs Reservation.

55. In addition, the Bureau of Indian Affairs now routinely contacts these same state agencies on behalf of the Mille Lacs Band. For example, last year, the Bureau of Indian Affairs formally advised the Minnesota Department of Transportation that it would be necessary for the Bureau of Indian Affairs to be "a party any agreement" on a road project where the alternative selected "transverses *within the exterior boundaries of the Mille Lacs Reservation.*" Bureau of Indian Affairs, Comments: E.I.S. Highway 169, undated (emphasis added).

56. The Band's comments on this project noted that there were (1) "Additional obligations to the Tribe that need to be identified. These include: *The Exterior Boundary of the Reservation, which is recognized by the Federal Government—not just trust land.*". . . (2) "The existing alignment and many of the alternatives are substantially *within the Exterior Boundaries of the Reservation.*" Comments: E.I.S. Highway 169, from Jody Rooney, Sr. Planner Corporate Commission, Mille Lacs Band at 2, 4, dated December 19, 2001 (emphasis added).

57. Within the last several months, the Band has also required County subcontractors to have Band archeological permits before proceeding with County bridge construction projects on fee lands within the area in controversy. Presumably, the Band is acting pursuant to the Mille Lacs Band Statutes Annotated, VOLUME I:

> [T]he Mille Lacs Band of Chippewa Indians Cultural Resources Protection Statute. . . .
>
> § 108. Undertakings *on-reservation* (emphasis added)
>
> The Board is authorized and directed to review any proposed undertaking that might adversely affect *any*

> *on-reservation* archeological resource of historic property included on or eligible for inclusion on the Band's Register or the National Register. The Board is also empowered to consider requests for consent to on-reservation excavation or removal of archeological resources. . . *Id.* at 328, 333 (emphasis added).

58. The County believes that the Band has also executed other Memoranda of Understanding with various agencies in the federal government, on the basis of their claim that the 1855 Mille Lacs Reservation continues to exist.

59. In addition, members of the Band, the Band and its legal representatives have repeatedly refused to file and protested and objected to requests from the County Zoning Office regarding routine compliance with County zoning ordinances. In every instance, the members of the Band and the Band rely on the reservation status of the 1855 Mille Lacs Reservation to support their refusal and/or failure to comply.

60. To some extent, this zoning conflict continues to date. In other instances, compliance under protest has temporarily resolved some of the violations. In any event, with the reservation status claim unresolved, additional conflicts are certain.

61. The County does not know if the Band has recently adopted a Band zoning statute for the contested area. (All of the statutes of the Mille Lacs Band are not reproduced in volumes cited above.) The County does know that the Band has published an extensive ZONING ORDINANCE in draft form.

62. The fact that the draft ZONING ORDINANCE is still a draft, together with all the recent zoning cooperation "under protest", suggests a concerted effort to not add to any more conflict that would otherwise support the basis for this Declaratory Judgment.

NEGOTIATIONS

63. In 2001, in an attempt to resolve the issue of the status of the 1855 Mille Lacs Reservation without litigation, the County initiated negotiations with the Mille Lacs Band. After several months and several meetings, and despite legitimate good-faith efforts and the assistance of an attorney with extensive mediation experience, this effort ultimately proved unsuccessful. Although several positive factors emerged as a result of this process, a somewhat unexpected and very unfortunate consequence also developed: namely, heightened divisiveness and an undue focus on this divisive factor by some on each side, as well as some in the media.

64. The County realizes that any lawsuit is also devisive. Although some will claim to the contrary, this declaratory judgment action is filed, in part, in an attempt to curb some of this unfortunate commentary and ill will. The practical and predictable consequences of allowing the conflict associated with this sensitive and important issue to continue to fester unabated are significant.

APPROPRIATENESS OF DECLARATORY RELIEF

65. In this instance, the factors noted in this complaint clearly suggest that this controversy should be resolved by declaratory judgment. The legal dispute over the status of the 1855 Reservation is not merely an abstract disagreement. The controversy has manifested itself in numerous specific conflicts, recounted above. A resolution of 1855 Reservation status controversy in this case will resolve the source of these conflicts.

66. In addition, reservation status is a legal issue that can be resolved without significant factual development of the record. As such, the issue is fit for judicial determination, which will largely settle the parties' dispute expeditiously.

67. The harm to the County noted above is traditional in terms of actual damages (pecuniary and otherwise). Moreover, in October, 2001, the Band filed a motion with Interior Board of Indian Appeals to require the County to post a bond to cover the *millions of dollars* claimed for additional costs of construction of a sewer project. Although the Interior Board of Indian Appeals rejected the motion of the Band, the record establishes the harm claimed by the parties. Motion to Require Appeal Bond and Expedite Briefing and Consideration of Appeal, *County of Mille Lacs, Minnesota v. Larry Morrin, Midwest Regional Director, Bureau of Indian Affairs* No. IBIA 02-1-A October 19, 2001, with attached Declaration of Robert Szrot, October 18, 2001 at 5.

68. In addition to the financial claims in this bond motion, the Band also claimed delay in the construction of new housing "leaving some in over-crowded and substandard living conditions and others unable to live and work on the reservation at all." The Band further alleged "very serious risks to the public health and the environment." *Id.* As a result, the insecurity caused by the contending interpretations of reservation status clearly works a present harm on both parties' ability to plan and conduct business operations.

69. Failure to address the merits of the claim will also cause the parties significant uncertainty and harm. Delayed review will further harm the County in that uncertainty will be heightened and modifications in behavior will certainly result. Delayed resolution also works a definite, significant and tangible future harm involving significant financial expenditures.

70. At the very least, the County has demonstrated that real danger of direct and immediate injury as a result of this reservation status controversy exists under any analysis. The County should not be required to await the consummation of additional harmful developments that further prejudice its position.

71. At the time of review in this Court, the pertinent aspects of the administrative matters noted above will be final with respect to reservation status. And, in any event, the administrative record is demonstrably insufficient insofar as this issue is concerned. Clearly, this Court has the discretion and the authority to insure that this important issue is properly presented in a forum where a complete evidentiary record can be developed.

72. One final consideration bears mentioning. As a practical matter, the County can ill-afford, especially in time of state budget cut-backs, to continue to expend substantial time and scarce resources in attempting to protect its interest in a myriad of fora throughout Minnesota and the United States. On the other hand, the Band, with tens of millions of dollars in casino profits (as well as the support of the United States), is ideally positioned to continue to work this issue until reservation status is firmly recognized in so many instances as to cause the reservation to be resurrected *de facto* —without a timely review of reservation status in any federal district court.

73. If this Court were to withhold adjudication, by the time the County could return here, with the same arguments and evidence, the Band would probably argue that the County was too late. In this instance, considerations of practicality and wise judicial administration buttress the normal principle that federal courts should adjudicate claims within their jurisdiction.

FIRST CLAIM FOR RELIEF

74. As a matter of law, defendants should be estopped from contesting the disestablished status of the 1855 Mille Lacs Indian Reservation.

75. At the turn of the last century, the Band filed suit in the Court of Claims against the United States because this reservation had been disestablished without proper compensation.

76. In 1912, attorneys for the Band repeatedly told the Court of Claims that the 1855 Mille Lacs Reservation was "taken", "lost", "relinquished", "finally extinguished", "extinguished" and "legally extinguished" and that the Mille Lacs were "deprived of their reservation as a home and for every purpose whatever." 433. Brief of Claimant, *Mille Lac Band of Chippewa Indians v. United States,* 47 Ct. Cl. 415 (1912), REPRESENTATIVE EXCERPTS, Exhibit 1 at 1-6. The United States agreed. Defendants' Brief [United States] in Support of Motion for a New Trial, and Request for Amended Findings of Fact, *The Mille Lac Band of Chippewa Indians in the State of Minnesota v. The United States*,47 Ct. Cl. 415 (1912), REPRESENTATIVE EXCERPTS, Exhibit 1 at 6-14. The Court of Claims concluded that the Mille Lacs Band had been "divested... of their reservation." *Mille Lac Band of Chippewas v. United States*, 47 Ct. Cl. 415, 454 (1912).

77. In 1913, attorneys for the Band repeatedly told the United States Supreme Court of the "relinquishment of the Mille Lacs Reservation" and that "such reservation was extinguished as an Indian reservation." ("All the rights of the Mille Lacs in and to such Reservation were denied" "relinquished their right of occupancy in the Mille Lacs Reservation" "that claimant relinquished such reservation" "they parted with it by cession and relinquishment" "[f]inally relinquished to the United States the Mille Lacs Reservation.") Brief of Claimant, *Mille Lac Band of Chippewa Indians v. United States*, 229 U.S. 498 (1913), REPRESENTATIVE EXCERPTS, Exhibit 1 at 15-17. The United States agreed again. REPRESENTATIVE EXCERPTS, Exhibit 1 at 16; Brief of United States, *Mille Lac Band of Chippewa*

Indians v. United States, 229 U.S. 498 (1913), REPRESENTATIVE EXCERPTS, Exhibit 1 17-21. The United States Supreme Court squarely recognized "the relinquishment of that reservation." *U.S. v. Mille Lac Band of Chippewa Indians*, 229 U.S. 498, 507 (1913).

78. Significantly, since that time, Congress has not acted to reestablish the 1855 Mille Lacs Reservation.

79. For nearly a century, the reservation or Indian country designation in this area has been limited to informal references to small acreages held in trust for the Mille Lacs Band members or the Mille Lacs Band. This Court should confirm that defendants are estopped from contesting the disestablished status of the 1855 Mille Lacs Reservation.

SECOND CLAIM FOR RELIEF

80. As a matter of law, the 1855 Mille Lacs Reservation was disestablished/diminished under various federal treaties, laws and statutes including, but not limited to, the 1863 Treaty with the Chippewa (12 Stat. 1249), the 1864 Treaty with the Chippewa (13 Stat. 693), the Act of January 14, 1889 (25 Stat. 642) and the Act of May 27, 1902 (32 Stat. 245). The legal arguments of Defendants that claim this former reservation area is still within the limits of a reservation and "Indian country" under 18 U.S.C. § 1151(a) are without merit.

81. For nearly a century, the reservation or Indian country designation in this area has been limited to informal references to small acreages held in trust for the Mille Lacs Band members or the Mille Lacs Band. This Court should confirm that historical understanding.

THIRD CLAIM FOR RELIEF

82. The Indian Claims Commission Act of 1946, 60 Stat. 1049 (formerly codified at 25 U.S.C. § 70(a)), precludes the resurrection of the 1855 Mille Lacs Reservation.

PRAYER FOR RELIEF

WHEREFORE, the County prays for judgment as follows:

(1) Assume jurisdiction over this action and schedule the matter for prompt disposition.

(2) Issue a declaratory judgment that the exterior boundaries of the 1855 Mille Lacs Indian Reservation have been disestablished/diminished.

(3) Award the County such incidental or corollary relief as may be proper under the circumstances.

(4) Allow the County its cost and disbursements.

(5) For such other additional or alternative relief as the Court deems just in the premises.

Respectfully submitted this 20th day of February, 2002.

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EXHIBIT 1

REPRESENTATIVE EXCERPTS

I. *Mille Lac Band of Chippewas v. United States*, 47 Ct. Cl. 415 (1912)

A. Brief of Claimant [Mille Lac Band], *Mille Lac Band of Chippewa Indians v. United States* (No. 30447)

1. [C]ouncils were had by said commissioners with the Mille Lac band of Indians at Mille Lac with a result that on October 5, 1889, the Mille Lacs ceded to the United States all their right, title and interest in and to . . . and, *did forever relinquish to the United States their right of occupancy to the Mille Lac Reservation reserved to them by the treaty of March 11, 1863, and May 7, 1864*, on the condition and with the express promises . . . Brief of Claimant, *The Mille Lac Band of Chippewa Indians v. United States* at 430-431 (No. 30447).

2. [T]hat the United States, through the Interior Department, refused to permit any Mille Lac Indian to take allotment on such reservation; . . . *such reservation was extinguished as an Indian reservation*; all the rights of the Mille Lacs in and to such reservation were denied; . . . *the Mille Lacs were deprived of their reservation as a home and for every purpose whatever*. *Id.* at 433 (emphasis added).

3. Such *reservation was practically taken* from the Mille Lacs . . . *the title of all of the land on such reservation, except about six thousand acres was confirmed* in the then occupants and pretended owners of such lands. *Id.* at 433 (emphasis added).

4. That at the time of the *taking of such reservation* . . . *Id.* at 433 (emphasis added).

5. Has the claimant done anything since December 20, 1893, to bar or mitigate *their right or claim against the United States Government for taking from such band the*

Mille Lac reservation, contrary to the provisions of the act of January 14, 1889, and, contrary to the agreement of the United States through its said commissioners? *Id.* at 435 (emphasis added).

6. [T]he right of the Mille Lacs to recover *the reasonable value of all of the lands and the pine timber upon the Mille Lac reservation at the time of the cession and relinquishment. Id.* at 440 (emphasis added).

7. The act of February 15, 1909, gives to the Court of Claims jurisdiction to determine the damages suffered by the Mille Lac band of Chippewa Indians in the State of Minnesota or the Chippewas of Minnesota by reason *of the opening of the Mille Lac reservation in the State of Minnesota to public settlement under the general land laws of the United States. Id.* at 440 (emphasis added).

8. All but six thousand acres of *the lands of the Mille Lac reservation were taken from the Mille Lac band* by the United States, or by the United States suffered to be taken, long prior to December 19, 1893. *Id.* at 441 (emphasis added).

9. The measure of damages for the *taking of such reservation* is the reasonable value of the pine timber and agricultural lands . . . . *Id.* at 441 (emphasis added).

10. Inasmuch as *the cession and relinquishment, including the Mille Lac reservation, was made by the Mille Lac band of Chippewas . . . Id.* at 441 (emphasis added).

11. The only band required to *sign any cession or relinquishment of the Mille Lac reservation* was the Mille Lac band. *Id.* at 443 (emphasis added).

12. It will be noted that the "extinguishment of the Indian title was to take place without any further act or ceremony whatsoever for the purpose and upon the terms in this act provided." *Id.* at 444.

13. Since the 5th of October, 1889, the members of the Mille Lac band have done nothing by which they have in any way parted with or forfeited any of *their right or interest in and to the reasonable value of the lands of such reservation . . . Id.* at 444 (emphasis added).

14. Such Indian title to the Mille Lac Reservation remained in the Mille Lac band *until their cession and relinquishment of such reservation to the United States, October 5, 1889. Id.* at 451-452 (emphasis added).

15. Ought the Government to pay for the Reservation *so taken*? *Id.* at 462 (emphasis added).

16. As has been shown, the *purpose of that act was to take this Mille Lac Reservation . . . Id.* at 462 (emphasis added).

17. The land was taken by others with the consent of the Government, the *Mille Lacs lost their reservation. Id.* at 462 (emphasis added).

18. It is *admitted* that Congress had *the power to destroy the Mille Lac reservation, to blot it out of existence. Id.* at 466 (emphasis added).

19. It is claimed [by Plaintiff] that the passage of the joint resolution of December 19, 1893, which legalized these otherwise void entries on the Mille Lac reservation, *extinguished the Mille Lac reservation, took the entire reservation away from the Mille Lac Indians because it was no longer an Indian reservation. Id.* at 466 (emphasis added).

20. Nothing had happened, nothing could happen until this act of Congress, to *deprive that band of Indians of their rights, under those treaties, to the Mille Lac reservation. Id.* at 467. (emphasis added).

21. So while *it is admitted that Congress had the power and did legally extinguish the Mille Lac reservation . . . Id.* at 467 (emphasis added).

22. [A]nd *relinquishment of such reservation* to the United States in October, 1889. *Id.* at 467-468 (emphasis added).

23. [T]he passage of the joint resolution of December 19, 1893, which *extinguished the Mille Lac reservation*, the right of action against the United States *for the reasonable value of this reservation was complete*, except their right to sue, which they only had upon the passage of the act of February 15, 1909. *Id.* at 468 (emphasis added).

24. [A]ll but six thousand acres of the lands of the Mille Lac reservation were, prior to the passage of the act of Congress in 1893, entered in some way or another. Of course the entering of these lands really ousted the Mille Lacs from their possession... *Id.* at 470.

25. The measure of damages for the taking of such reservation is the reasonable value of the pine timber and agricultural lands... *Id.* at 471 (emphasis added).

26. Since the resolution of December 19, 1893, *extinguished the reservation* and legalized all the entries which had been made, as a matter of course . . . *Id.* at 471 (emphasis added).

27. *[A]s the reservation was taken from the Mille Lacs* at that time, if the Mille Lacs were entitled to any damages whatever *they were entitled to the reasonable value of the reservation at that time. Id.* at 471 (emphasis added).

28. So the measure of damages would be *the reasonable value at the date when the reservation was extinguished. Id.* at 471 (emphasis added).

29. *Inasmuch as the cession and relinquishment, including the Mille Lac reservation, was made by the Mille Lac band of Chippewas* . . . *Id.* at 471 (emphasis added).

30. Since the United States obtained a *cession and relinquishment* from the Mille Lacs under the act of January 14, 1889 . . . *Id.* at 474 (emphasis added).

31. The only band required to sign any *cession or relinquishment of the Mille Lac Reservation* was the Mille Lac band. *Id.* at 475-476 (emphasis added).

32. [I]t was the design and purpose of Congress to obtain a cession from such Chippewa Indians, to the United States, of all their *tribal lands* in Minnesota; and, *from the Mille Lacs the Mille Lac reservation . . .* *Id.* at 480 (emphasis added).

33. The Chippewa Indians united in ceding to the United States the tribal lands, and, *the Mille Lac band ceded and relinquished to the United States their right to the Mille Lac Reservation.* *Id.* at 481 (emphasis added).

34. The United States . . . *finally extinguished the reservation, took the entire reservation away from the Mille Lacs.* *Id.* at 481 (emphasis added).

35. FINDINGS OF FACT . . . four fractional townships, viz.: 42 N. of R. 25; 42 N. of R. 26 W., and 42 and 43 N. of R. 27 W., and also the three islands in the southern part of Mille Lac Lake, which reservation was known as Mille Lac reservation . . . *Id.* at 485.

36. That the Mille Lac band of Indians refused to make such relinquishment of their rights of occupancy of the Mille Lac Reservation, *until . . .* *Id.* at 494 (emphasis added).

37. That the Mille Lac band of Chippewa Indians consented to enter into and did enter into the agreement of October 5, 1889, by which *they relinquished their right of occupancy of the Mille Lac Reservation to the United States . . .* *Id.* at 495 (emphasis added).

38. That subsequent to the 5th day of October, A.D. 1889, and on March 4th, 1890, *the cession and relinquishment so made by the Mille Lac band of Indians on the 5th day of October, 1889, was approved by the President of the United States.* *Id.* at 495-496 (emphasis added).

39. [T]he Government . . . has ever since refused to make any allotments upon said reservation to any of the Mille Lac Indians . . . *Id.* at 499-500.

40. That since the passage of the Act of January 14, 1889, and *such cession and relinquishment of the Mille Lac reservation to the United States . . . the relinquishment by the Mille Lac band of Indians of all their right in the Mille Lac Reservation* reserved to them by Article 12 of the treaty of 1863, and confirmed to them again by the treaty of 1864, the entire Mille Lac Reservation, to-wit: The four fractional townships and the three small islands . . . *Id.* at 503 (emphasis added).

41. That by reason of the opening of the Mille Lac Reservation in the State of Minnesota, containing about 61,028.14 acres of land, to public settlement, under the general land laws of the United States, *the Mille Lac band have been deprived of their rights and interests in and to the Mille Lac Reservation . . . Id.* at 504 (emphasis added).

42. [I]n accordance with the promises made by the commissioners to the Mille Lac band *at the time they made such cession and relinquishment of their rights in and to the Mille Lac Reservation . . .* have been deprived of all the pine lands in the said Mille Lac Reservation, and *all of the land comprising such Mille Lac Reservation, and all of their right, title and interest in and to such reservation. Id.* at 505 (emphasis added).

43. That since the passage by Congress of the joint resolution of December 19, 1893, *there has been no Mille Lac Reservation, and the entire reservation*, except less than a section [640 acres], has been opened to public settlement under the general land laws of the United States and has been appropriated and is now occupied and held by white settlers. *Id.* at 505 (emphasis added).

44. *[T]he Mille Lac Reservation was extinguished*, it was opened to public settlement under the general land laws of the United States; the entries thereon made prior to such act were legalized, *and the Mille Lac Reservation as an Indian reservation ceased to exist. Id.* at 507 (emphasis added).

B. Defendants' Brief [United States] in Support of Motion for a New Trial, and Request for Amended Findings of Fact, *The Mille Lac Band of Chippewa Indians in the State of Minnesota v. The United States*, No. 30447

1. [B]y article 1 of which the Gull Lake, Mille Lac, Sandy Lake, Rabbit Lake, Pokagomin Lake, and Rice Lake Reservations, described in the second clause of the second article of the treaty of February 22, 1855, were "*ceded* to the United States" . . . *Id.* at 10. (emphasis added)

2. So that on March 31, 1884, out of 61,028.14 acres contained in the former Mille Lac Reservation, 55,976.42 acres had been filed upon under the general land laws of the United States . . . *Id.* at 17. (emphasis added).

3. On June 24, 1909, all of said lands on the *former* Mille Lac Reservation had been disposed of on Chippewa half-breed scrip, agricultural college scrip, soldiers' additional homestead entries, other homestead and preemption entries, and patents to the State of Minnesota of swamp lands, except 126.75 acres (rec., p. 47). . . . *Id.* at 17-18. (emphasis added).

4. Prior to 1872 twenty-five individuals of the Mille Lac Band had removed to White Earth. Prior to May 10, 1882, nearly 400 had removed to that reservation. (H. R. 1388, 60th Cong., 1st sess., pp. 8, 12.) Prior to December 1, 1886, of the Mille Lac Band of Indians not more than 200 remained on the *former* Mille Lac Reservation, and few of these lived there permanently. (Rep. of Commissioners under the act of May 15, 1886; Sen. Ex. Doc. 115, 49th Cong., 2d sess., p. 21.) On August 30, 1902, there were 125 male adults

on the *former* Mille Lac Reservation, quite a number of whom had received allotments on the White Earth Reservation. (Rec., pp. 161, 340.) On January 31, 1911, there were 174 of the Mille Lac Indians scattered around on the former Mille Lac Reservation. (Final report of D. S. Hall, Chippewa commissioner, filed in case.) *Id.* at 19-20. (emphasis added).

5. On October 9, 1886, . . . Wright, Whipple, and Larrabee met in council with the Mille Lac Band at Rum River Outlet for the purpose of securing an agreement for the removal of that portion of the Mille Lac Band still residing on the old White Earth Reservation, about 200 in number. During the negotiations for an agreement the commissioners informed said Indians that *they had already ceded the Mille Lac Reservation to the United States by the treaty of 1863, while the Indians on their part denied that they had ceded the said reservation*, and refused to accept the construction placed upon the treaty by the commissioners, and Shaw-bosh-kung when shown his signature to said treaty claimed that he only signed as a witness. *Id.* at 20. (emphasis added).

6. [T]he commissioners again met the Mille Lac Indians still remaining on the *old* Mille Lac Reservation, chiefs, headmen, and braves to the number of forty, and a communication from the Secretary of the Interior, L.Q.C. Lamar, transmitted by telegraph on October 23, 1886, was read to the Indians, in which he said the President had heard with great surprise and disappointment of their refusal to consent to remove to the White Earth Reservation, where they would be beyond the reach of avaricious white men and have good homes with peace and plenty; and if they persisted in remaining on their old reservation they would do so at their own risk; that "It is the desire of the President that the commissioners explain fully to these Indians the condition of affairs; that *they have ceded the lands of the Mille Lac Reservation* to the United States, and are permitted to remain

there only so long as they shall not in any way interfere with or molest the persons or property of the whites. The President desired that the commissioners shall make another effort to induce these Indians to remove to White Earth, where all the Chippewas will be united in one happy and prosperous family." *Id.* at 21. (emphasis added).

7. The commissioners reported that there were not more than 200 of the entire band living on the Mille Lac Reservation, and few of these were living there permanently, but were scattered through the country south of the reservation, principally on Snake River (id., p. 21); that with the exception of three or four old log shanties there was not a house on the reservation; that they were living summer and winter in small and poorly constructed birch-bark wigwams; that the women and children were kept in a state of absolute barbarism half starved, without shelter or clothing, and this through the blind and willful action of a few superstitious, beggarly old chiefs and medicine men, who may or may not be in the power of the "whisky men and lumber thieves." (Id., p. 19.) *Id.* at 22.

8. [T]he right of occupancy of the *former* Mille Lac Reservation under article 12 of the treaty of May 7, 1864, was *relinquished* by the Mille Lac Band. *Id.* at 27. (emphasis added).

9. [W]e do also hereby forever relinquish to the United States the right of occupancy on the Mille Lac Reservation, reserved to us by the twelfth article of the treaty of May 7, 1864 (13 Stat., p. 693). *Id.* at 28.

10. On December 19, 1893, Congress passed a joint resolution "For the protection of those parties who have heretofore been allowed to make entries for lands within the former Mille Lac Indian Reservation, in Minnesota". . . *Id.* at 29 (emphasis added).

11. On May 27, 1898 (30 Stat., 745), Congress passed a joint resolution declaring:

> That all public lands *formerly* within the Mille Lac Indian Reservation, in the State of Minnesota, be, and the same are hereby, declared to be subject to entry by any bona fide qualified settler under the public land laws of the United States . . . *Id.* at 30 (emphasis added).

12. [T]o appraise the improvements of the Mille Lac Indians on the former Mille Lac Reservation and to secure an agreement with them to remove from said reservation as a condition precedent to receiving the sum of $40,000 provided by the act. Act of May 27, 1902 (32 Stat., 268). *Id.* at 32 (emphasis added).

13. These two officials held a number of councils with the Mille Lac Indians on the *former* Mille Lac Reservation, who numbered 75 adults living around the shores of Mille Lac. (Rec., pp. 122-157.) It was thoroughly explained to the Indians that they had already parted with all their rights on the *former* Mille Lac Reservation. *Id.* at 32 (emphasis added).

14. The improvements on the *old* Mille Lac Reservation, at that time, were of practically no value, the object in view being the peaceable removal of the Indians to the White Earth Reservation. *Id.* at 32. (emphasis added).

15. On August 30, 1902, an agreement was accordingly entered into between the United States and the Mille Lac Chippewas residing on the *former* Mille Lac Reservation, by which they agreed to remove therefrom upon the payment of the $40,000 appropriated . . . *Id.* at 33 (emphasis added).

16. The Indians on the White Earth Reservation had all the advantages of schools, medical attendance, police protection, and supervision of the agent, while those on the *former* Mille Lac Reservation had none of these advantages, but were exposed on account of their residence among white

people in a newly settled country to all the evils of drunkenness and its attendant miseries. (Rec., pp. 59, 88, 101, 102, 340.) *Id.* at 33-34. (emphasis added).

17. On March 1, 1877, the Hon. Z. Chandler rendered an opinion construing the treaties of March 11, 1863, and May 7, 1864, in which he held that said treaties conveyed all of the title and interest of the Mississippi Chippewas in and to the six reservations ceded, and contemplated the removal of the Mille Lac Band from the old Mille Lac Reservation to the reservation set apart for the Mississippi Chippewas, and that the old Mille Lac Reservation had thereby become a part of the public lands of the United States . . . *Id.* at 34 (emphasis added).

18. On May 10, 1882, Hon. Henry M. Teller, Secretary of the Interior, delivered an opinion in which he took the same ground as had been previously taken by Secretary Chandler, that under the treaties of March 11, 1863, and May 7, 1864, the Mille Lac Reservation had been *ceded* by the Mississippi Chippewas to the United States, and that the lands had thereby become a part of the public domain of the United States, open to entry under the general land laws; but that the Indians were entitled to a sufficient quantity of land for their residence so long as they observed the requirements of article 12 of the treaty of 1864. *Id.* at 35 (emphasis added).

19. On August 21, 1886, Secretary Lamar rendered an opinion . . . in which he held that although the Mille Lac Indian Reservation had been ceded to the United States by the treaty of 1863, and had become public lands, no patents could be issued for such lands until further legislation by Congress authorizing such action. (5 Land Decisions, 102.) *Id.* at 36.

20. On October 23, 1886, Secretary Lamar rendered another opinion in which he again held that the Mille Lac Reservation had been ceded to the United States, and the Indians were only permitted to remain so long as they did not

interfere with or molest the property or persons of the whites. *Id.* at 36.

21. On January 9, 1891, Secretary Noble rendered another opinion (12 Lands Decisions, 52), after the agreement with the Mille Lac Band had been entered into in pursuance of the act of January 14, 1889, supra, on October 5, 1889, and approved by the President March 4, 1890, in which he held that the act of January 14, 1889, was the further legislation required by the act of July 4, 1884, and that entries on the Mille Lac Reservation might go to patent. *Id.* at 37.

22. CONCLUSIONS OF LAW. . . . By the treaty of May 7, 1864 (13 Stat., 693), the Chippewas of the Mississippi *ceded* all of their title and interest in and to the Gull Lake, *Mille Lac*, Sandy Lake, Rabbit Lake, Pokagomin Lake, and Rice Lake Reservations to the United States, which thereupon became public lands of the United States, open to entry under the general land laws. The Mille Lac Band, on account of their good conduct during the Indian troubles of 1862, were permitted by the United States, as a favor, by proviso 1 of article 12 of said treaty, to remain upon the old Mille Lac Reservation so long as they did not in any way interfere with or in any manner molest the property of the whites. *Id.* at 39-40 (emphasis added).

23. [E]quitable adjustment made to said Indians of any claim they might have had for the relinquishment of their right of occupation of the *former* Mille Lac Reservation . . . *Id.* at 41 (emphasis added).

24. [I]t is not a fact that the Mille Lac Indians occupied the old Mille Lac Reservation until after the passage of the act of 1889, the evidence showing that only 200 or less remained on said reservation in 1886. *Id.* at 50 (emphasis added).

25. [T]he entries made upon the *old* Mille Lac Reservation have not been set out with sufficient accuracy or in sufficient detail . . . *Id.* at 50 (emphasis added).

26. That in their agreement with the Government, pursuant to the act of January 14, 1889, they relinquished their license of occupancy given by the twelfth article of the treaty of 1864 . . . *Id.* at 54.

27. That *Congress, having purchased, by agree-ment, the Mille Lac Reservation*, at an adequate consideration, on May 7, 1864, had the right at any time to terminate the license of occupancy of the claimants, who were merely tenants by sufferance, without interest in the lands or timber. *Id.* at 54 (emphasis added).

28. [T]he jurisdictional act only required the court to assess the damages, or, in other words, the value of the old reservation. *Id.* at 65.

29. [L]ands on the Mille Lac Reservation had been entered to the amount of 55,976.42 acres, and at the filing of this suit only 126.75 acres remained open to entry. *Id.* at 78.

30. The removal of the Mille Lac Band from the Mille Lac Reservation began some time prior to 1872, and on December 1, 1886, not more than 200 remained on the *old* reservation, a few of these living there permanently. On August 30, 1902, all except 125 male adults had removed from the *old reservation*, and *quite a number of those remaining had received allotments on White Earth Reservation*; and on January 31, 1911, only 174 remained scattered over the old Mille Lac Reservation. *Id.* at 78 (emphasis added).

31. They had *sold all of their reservations, including the Mille Lac Reservation*, together with the other bands of Mississippi Chippewas, and had received the money. Perhaps the reason for their remaining on the *old* Mille Lac Reservation is explained in a letter from Commissioner Dole to

General Pope, commanding the Department of the Northwest, dated September 18, 1862, in which he says, "I trust, however, that in any event the Indians at the Mille Lac and Sandy Lake Reservations will be protected, as they have my promise to that effect, they having refused to join Hole-in-the-Day in his raid against the white people," and it was perhaps, therefore, considered wiser to allow them to remain upon their old reservations until all feeling between the different factions of the Mississippi Chippewas should have died out. *Id.* at 82 (emphasis added).

32. [A]bsurd contention of the claimants in the case at bar, that by the first proviso of article 12 of the treaty of May 7, 1864, the Government had receded to the Mille Lac Band the old Mille Lac Reservation. The court there said: "It is impossible that a party can be both grantor and grantee of the same premises, in the same right, in the same stipulation." *Id.* at 88.

33. At the time the act of January 14, 1889, was passed, 55,976.44 acres of the 61,028.14 acres of land contained in the old Mille Lac Reservation were covered by subsisting valid entries, made under preemption and homestead filings . . . *Id.* at 93 (emphasis added).

34. [T]wo councils were held by commissioners appointed under the act of May 15, 1886, *supra*. At the last council 40 Mille Lac Indians were present, being about the proper proportion of adult Mille Lacs to the 200 still remaining on the old Mille Lac Reservation. They were informed upon both occasions that *they had already ceded all of their right, title, and interest in and to the Mille Lac Reservation* to the Government by the treaty of May 7, 1864, and a letter from Secretary Lamar to that effect was read to them, and also one from ex-Senator Henry M. Rice urging them to comply with the request of the Government to remove, and as an inducement to remove peaceable they were

offered the sum of $25,000, but they refused to sign the agreement. *Id.* at 94-95 (emphasis added).

35. [T]he word "relinquishment," as employed by the Mille Lac Band in its agreement of October 5, 1889, surrendering its occupancy of the old Mille Lac Reservation, had the same force and effect as the word "ceded," used by the said band in disposing of its interest in other reservations which had never before been ceded, or by the other bands in ceding their lands, the Indian title of which had not been extinguished. *Id.* at 97.

36. It is very clear that the proviso of section 3, which gave to any Indian residing on any of said reservations the right to select an allotment there instead of being removed to White Earth Reservation, was not intended to apply to the Mille Lac Reservation, not only because the lands had already been *ceded*, but because the lands, as already stated, had been practically *disposed of*. *Id.* at 99 (emphasis added).

37. In the case at bar the old Mille Lac Reservation had already been sold and paid for, as agreed upon by the treaty of May 7, 1864, *supra*, and under the agreement of May 27, 1902 (32 Stat., 268), the Mille Lac Indians have received in addition to the price already paid for the whole reservation $40,000 for alleged improvements on the *old* Mille Lac Reservation, which, *as a matter of fact, existed in imagination only* . . . *Id.* at 109 (emphasis added).

38. The only interest the claimants in this case surrendered in the old Mille Lac Reservation was the right for some 200 Indians still remaining to continue their residence so long as they did not interfere with or molest the property or persons of the whites; or, in other words, for this remnant of the band to occupy the reservation which had already been sold, settled upon, and occupied by white people. *Id.* at 109 (emphasis added).

39. In debating the resolution of May 27, 1898, in the House of Representatives on May 5, 1898, Mr. Lacey said, speaking of the Mille Lac Reservation:

> This ceased to be an Indian reservation many years ago; but a portion of the Indians still remained there. It is now a part of the public domain. *Id.* at 113.

40. *It would appear, therefore, that the Indians, after due consideration and in the most formal manner, have, by treaty and agreement duly executed, parted with all their rights to the lands in this reservation. Id.* at 115.

II. *United States v. Mille Lac Band of Chippewa*, 229 U.S. 498 (1913)

A. Brief for the Appellee, Mille Lacs Band, *United States v. Mille Lac Band of Chippewa*, 229 U.S. 498 (1913) (No.736)

1. The *relinquishment of the Mille Lac Reservation* was obtained from the Mille Lacs with the understanding and belief on their part that. . . . Brief for the Appellee, Mille Lacs Band, *United States v. Mille Lacs Band of Chippewa*, 229 U.S. 498 (1913) (No.736) at II (emphasis added).

2. [T]he cession and relinquishment of the Mille Lacs Band of Chippewas of Mississippi and its *relinquishment of the Mille Lac Reservation*. . . . *Id.* at III (emphasis added).

3. [W]hich reservation was reserved to the Mille Lac Band of Indians under the treaties of 1863 and 1864, and *relinquished by it* to the United States, under the act of January 14, 1889, to be sold as provided. . . . *Id.* at 2 (emphasis added).

4. [D]id *forever relinquish* to the United States their right of occupancy on the Mille Lac Reservation reserved to them by the treaty of March 11, 1863, and May 7, 1864, . . . *Id.* at 5 (emphasis added).

5. [T]he United States, through the Interior Department, refused to permit the Mille Lac Indians to take allotment on such Reservation; the entire reservation was opened to public settlement, *such reservation was extinguished as an Indian Reservation; all the rights of the Mille Lacs in and to such Reservation were denied*;... *Id.* at 7 (emphasis added).

6. On October 5, 1889, after meeting on the reservation daily for four successive days with the Commissioners appointed under the Nelson act, they ceded and relinquished their rights in the other reservations in Minnesota, and *relinquished their right of occupancy in the Mille Lac Reservation* . . . *Id.* at 14 (emphasis added).

7. *The relinquishment of the Mille Lac Reservation* . . . *Id.* at 18 (emphasis added).

8. The contention of appellee [Mille Lacs Band] is:

> The Mille Lac band, *the claimant, had a reservation, the Mille Lac Reservation; that claimant relinquished such reservation to the United States* . . . *Id.* at 25 (emphasis added).

9. Appellant [United States] contends: That *claimant had no reservation*; or if so, it had been abandoned; . . . *Id.* at 26 (emphasis added).

10. Counsel for appellant [United States] say:

> The Mille Lac Reservation was ceded to the United States by the treaties of 1863 and 1864, and became public land opened to settlement. The Mille Lac band acquired no title thereto, but was permitted to remain thereon temporarily. *Id.* at 27.

11. Surely, the Indian title to the Mille Lac reservation was in them, remained in them *until they parted with it by cession and relinquishment. Id.* at 36 (emphasis added).

12. They had not forfeited such right of possession *at the time they made the [1889] cession and relinquishment.* *Id.* at 37-38 (emphasis added).

13. The Instrument of relinquishment by which *the Mille Lac band relinquished to the United States their right of occupancy to the Mille Lac Reservation* . . . *Id.* at 41 (emphasis added).

14. The Century Dictionary gives the following definitions of "Relinquish":

1.—To give up the possession or occupancy of; withdraw from; leave; abandon; quit.

2.—To cease from; give up pursuit or practice of; desist from.

3.—To renounce a claim to; resign.

Synonyms: Abandon, desert, let go, yield, cede, surrender, give up, lay down.

The same author defines "Cede" as follows:

1.—To yield; give away, submit. To pass; to be transferred.

2.—To yield or formally resign and surrender to another; relinquish, transfer; give up; make over.

It is thus seen that there is no difference primarily in the meaning of the two words,. . . *Id.* at 45-46.

15. THE *RELINQUISHMENT OF THE MILLE LAC RESERVATION WAS OBTAINED* FROM THE MILLE LACS WITH THE UNDERSTANDING . . . *Id.* at 59 (emphasis added).

16. THE CESSION AND RELINQUISHMENT BY THE MILLE LACS BAND OF CHIPPEWAS . . . AND *ITS RELINQUISHMENT OF THE MILLE LAC RESERVATION* . . . *Id.* at 60 (emphasis added).

17. [A]ppellee [Mille Lacs Band] *contends that the Mille Lac reservation was relinquished* to the United States in trust. *Id.* at 61 (emphasis added).

18. From 1855 *until their relinquishment to the United States on the 5th of October, 1889*, . . . *Id.* at 67 (emphasis added).

19. [T]he Mille Lac band *finally relinquished to the United States the Mille Lac Reservation*, . . . *Id.* at 88 (emphasis added).

B. Brief for the United States, *United States v. Mille Lac Band of Chippewa*, 229 U.S. 498 (1913) (No.736)

1. By article 1 of this [1864] treaty the Mississippi Bands *ceded absolutely* to the United States the six tracts theretofore set apart for them. Brief for the United States, *United States v. Mille Lacs Band of Chippewa*, 229 U.S. 498 (1913) (No.736) at 6 (emphasis added).

2. Between 1870 and 1884 nine-tenths of the Mille Lac Reservation was settled upon or preempted by the whites. *Id.* at 10.

3. [P]reemption entries aggregating 11,026.42 acres were located on the former Mille Lac Reservation, . . . *Id.* at 10-11. (emphasis added).

4. May 10, 1882, Secretary Teller, who had succeeded Mr. Schurz, wrote to the Commissioner of Indian Affairs, adopting the views of Mr. Chandler, and holding that the *so-called Mille Lac Reservation* was public land open to homestead and preemption claims. *Id.* at 13 (emphasis added).

5. Secretary Teller replied:

> I want all the entries heretofore canceled in the so-called Mille Lac Reservation reinstated . . . *Id.* (emphasis added).

6. [A]nother letter of Secretary Teller, dated February 13, 1883, to the Commissioner of the Land Office, stating that he had previously *held that there was no reservation*, and that the Mille Lac land was public land . . . *Id.* (emphasis added).

7. [D]ifferent agreements with the different bands, secured the *cession and relinquishment* to the United States . . . *Id.* at 20 (emphasis added).

8. [T]he right of occupancy of the *former Mille Lac Reservation* under article 12 of the treaty of May 7, 1864, was *relinquished* by the Mille Lacs Band. *Id.* at 20-21 (emphasis added).

9. [T]he Mille Lacs Band, under the provisions of the act of January 14, 1889, . . . *relinquished* their right of occupancy of the Mille Lac Reservation, reserved by article 12 of the treaty of May 7, 1864, *supra*. *Id.* (emphasis added).

10. I think the language of the statute of 1889 that the lands upon which the Mille Lacs have enjoyed the favor of residence so long as they should not interfere with the whites is equivalent to a declaration that this favor or license did *not* amount in effect to a "reservation" of these lands upon which the Mille Lacs could take allotments, . . . *Id.* at 22-23 (emphasis added).

11. [Secretary Teller] said: Suffice it to say *that the land in question was not a reservation* within the meaning of the act. It was *ceded* in 1863; . . . *Id.* at 23 (emphasis added).

12. On May 27, 1898 (30 Stat., 745), Congress passed a joint resolution declaring: That all public lands *formerly* within the Mille Lac Reservation . . . *Id.* at 25 (emphasis added).

13. In the Indian appropriation act of May 27, 1902 . . .'For payment to the Indians occupying the Mille Lac Reservation, . . . the sum of forty thousand dollars, . . . to pay

said Indians for improvements made by them, . . . upon *condition of said Indians removing* from said Mille Lac Reservation . . . *Id.* at 26 (emphasis added).

14. In pursuance of the provision of the above act an agreement was entered into on August 30, 1902, between the United States and the Mille Lac Indians still residing on the *former* Mille Lac Reservation, by which *they agreed to remove* to White Earth Reservation on the payment of $40,000 . . . *Id.* at 27 (emphasis added).

15. The Court of Claims erred: . . . In not holding that the acceptance by the Mille Lacs Band of the benefits of the Nelson Act of 1889 was a *final settlement of their claims* to the Mille Lac Reservation. *Id.* at 28 (emphasis added).

16. The Mille Lac Reservation was ceded to the United States by the treaties of 1863 and 1864, and became public land open to settlement. The *Mille Lacs Band acquired no title thereto, but was permitted to remain thereon temporarily*. *Id.* at 33 (emphasis added).

17. The *absolute cession* of the lands to the United States and the unmistakable intention to remove the Mille Lacs Band to the new reservation are not destroyed by the proviso. *Id.* at 35 (emphasis added).

18. The Secretary held that there was *no reservation*; that the Mille Lac tract was public land, . . . *Id.* at 38 (emphasis added).

19. This practical construction given to the treaty by the executive department charged with its enforcement (and which will be given great weight by the courts, *Brown v. U.S.*, 113 U.S., 568) was evidently recognized by the great majority of the Indians, *who voluntarily abandoned the reservation and removed to White Earth, where they accepted allotments*. *Id.* at 39 (emphasis added).

20. [A]ny Indian title which might have existed to the Mille Lac Reservation was in the band itself, and when the majority of them voluntarily removed that *title was gone*. *Id.* at 40 (emphasis added).

21. The Mille Lacs Band accepted its terms, agreeing to remove to White Earth, and thereby *ended all right of occupancy* of the Mille Lac tract. *Id.* at 41 (emphasis added).

22. The Mille Lacs Band with the others accepted the act, and thereby agreed that the remnant of their band still remaining on or near the *old* reservation would remove to White Earth. *Id.* at 42 (emphasis added).

23. So, when they voluntarily agreed to remove and to accept the benefits of the Nelson Act, the proviso was at an end, for there then arose a compulsion to remove.

There was therefore *no necessity for the cession of the old reservation*, and while the Mille Lacs Band were asked to and did sign deeds ceding all their interest in those portions of White Earth and Red Lake Reservations desired for settlement, when it came to the Mille Lac tract, their deed omitted the word cede and used only the word relinquish. The *relinquishment*, of course, was no more than a quitclaim, and even it was simply a precautionary measure, for the *tract had long since been ceded to the United States*, and *all claims of occupancy ceased by the agreement to remove without a cession*. *Id.* at 42-43 (emphasis added).

24. [T]he following extract from the report of the Secretary of the Interior, adopted as the report of the Committee on Public Lands on the resolution of May 27, 1898, it clearly appears that *Congress did not recognize any rights of the Mille Lac Indians in the old Mille Lac Reservation*: . . . it appears that by the treaties in 1863-4 these Indians ceded all their lands in this reservation to the Government, . . .

> *It would appear, therefore, that the Indians, after due consideration and in the most formal manner, have, by*

treaty and agreement duly executed, parted with all their rights to the lands in this reservation. *Id.* at 44-45 (emphasis added).

25. The Government, . . . expended large sums of money on the appellees at different times as a consideration for the cession of the Mille Lac Reservation. *Id.* at 47 (emphasis added).

26. [S]ome few of them remained on or near the *old* reservation. Therefore, the act of 1902, which was in reality a mere gratuity in order to secure the peaceful removal of this remnant, . . . 'upon condition of said Indians removing from said Mille Lac Reservation.'

It is noticeable that this act provides 'for the payment to the Indians occupying, etc.'; there is no reference to the Mille Lacs Band as a band, but merely to the few scattered Indians who are remaining upon the [old] reservation without right. *Id.* at 47-48 (emphasis added).

EXHIBIT 2

EXCERPTS FROM THE MILLE LACS BAND STATUTES ANNOTATED, VOLUME I.

1. ENVIRONMENTAL PROTECTION CODE, TITLE II

§ 1. Purpose

(a) The purpose of Subchapters I and II of this chapter is to achieve a reasonable degree of purity of air, water, land, and natural resources of the Band consistent with . . . and use thereof in furtherance of the welfare of *all persons within the jurisdiction* of the Band. Subchapters I and II of this chapter are enacted by the inherent aboriginal and sovereign rights of the members of the Non-Removable Mille Lacs Bands of Chippewa Indians, *the Treaties of 1837 and 1855*, and by the authority vested in the Non-Removable Mille Lacs Bands of Chippewa Indians under Article I, Section 3; Article VI, Sections 1 and 2; and Article XIII of the Constitution of the Minnesota Chippewa Tribe.

(b) It is the purpose of Subchapters I and II of this chapter to establish and further the environmental policies of the Bands to provide for the prevention, control and abatement of the pollution of the air, water, and land, so far as feasible and practical, in furtherance of conservation of the natural resources and public health and safety of *all territories subject to the jurisdiction of the Band.* It is hereby declared that such efforts are necessary for the protection of present and future vital security interests of the Band and its members . . . .

* * * *

(d) It is the purpose of Subchapters I and II of this chapter, to perpetuate commonly held traditional beliefs, amongst American Indian people that human beings have a duty to peacefully co-exist within the natural environment. Human beings further have a natural duty to protect the

environment which provides humans with life-sustaining natural resources.

(e) It shall be the public policy of the Non-Removable Mille Lacs Bands of Chippewa Indians that each person has an inalienable right to the protection, preservation, and enhancement of air, water, land and other natural resources located within the jurisdiction of the Band and that each person has a legal duty to aid in the protection, preservation and enhancement of air, water, land and other natural resources located within the jurisdiction of the Band, so that all human beings may live in harmony with nature.

(f) It shall be the public policy of the Non-Removable Mille Lacs Bands of Chippewa Indians to enact and enforce a series of environmental protection measures which shall, at a minimum equal the environmental protection laws of the United States of America and, if necessary and prudent exceed the minimum standards established by federal law.

* * * *

§ 5. Powers and duties of Environmental Protection Commission

The environmental Protection Commission shall have the following powers and responsibilities:

(a) To administer and enforce all environmental protection regulations, herein enacted, of the United States of America and the Non-Removable Mille Lacs Bands of Chippewa Indians . . .

* * * *

(d) To adopt, issue, reissue, modify, deny, or revoke, enter into or enforce reasonable orders, permits, variances, standards, regulations, schedules of compliance, and stipulation agree-ments, under such conditions as it may prescribe, in order to prevent, control or abate pollution of the

air, waters, lands, or natural resources subject to the jurisdiction of the Band . . .

§ 6. Entry upon property. . .

* * * *

§ 8. Emergency powers

In the event that there is imminent and substantial danger to health and welfare of the members of the Band as a result of the pollution of air, water, land or natural resources; upon such finding, the Environmental Protection Commission may by emergency directive order the immediate discontinuance of abatement of such pollution without notice and without a hearing, or at the request of the Commission, the Solicitor General of the Band may bring an action in the name of the Band in any court of competent jurisdiction for a temporary restraining order t immediately abate or prevent such pollution. Such Commission directive or temporary restraining order shall remain effective until notice, hearing and determination are effected pursuant to other provisions of law, or, in the interim, as otherwise ordered. Such Commission directive shall be appealable to the Court of Central Jurisdiction.

§ 9. Jurisdictional authority

The Environmental Protection Commission shall exercise all the environmental jurisdiction possessed by the Non-Removable Mille Lacs Bands of Chippewa Indians as stated herein:

(a) The Non-Removable Mille Lacs Bands of Chippewa Indians shall exercise concurrent environmental jurisdiction with the United States of America over the air space encompassing all lands and waters subject to the jurisdiction of the Band.

(b) The Non-Removable Mille Lacs Bands of Chippewa Indians shall exercise concurrent environmental jurisdiction

with the United States of America over all streams, lakes, ponds, marshes, watercourses, waterways, wells, springs, reservoirs, aquifers, irrigation system, drainage systems and all other accumulations of water, surface or underground, natural or artificial, public or private, which are contained within, flow through or border upon lands of the Mille Lacs Bands of Chippewa Indians.

(c) The Non-Removable Mille Lacs Bands of Chippewa Indians shall exercise concurrent environmental jurisdiction with the United States of America over:

> (1) *all lands within the exterior boundaries of the Mille Lacs Reservation and Sandy Lake Reservation as established by the Treaty of 1855* . . .
>
> * * * *

(e) *The exercise of civil jurisdiction of the Non-Removable Mille Lacs Bands of Chippewa Indians over non-Indians, in environmental protection causes of action shall exist to the extent authorized by the laws of the United States of America.* The criminal jurisdiction of the Non-Removable Mille Lacs Bands of Chippewa Indians shall not extend to non-Indians.

(f) *The jurisdiction of the Non-Removable Mille Lacs Bands of Chippewa Indians shall extend to all persons, political sub-divisions and their officers and agents, public or private corporations, associations, partnerships and any other individuals or entities who shall violate the environmental protection laws of the Band within the exterior boundaries of the Mille Lacs and Sandy Lake Reservations or on lands held in trust or fee status in the name of the Band, as authorized pursuant to the laws of the United States of America.*

§ 10. Judicial authority

(a) *The Court of Central Jurisdiction shall have original jurisdiction over any civil or criminal violation of the environmental protection laws* of the Non-Removable Mille Lacs Bands of Chippewa Indians, subject to the provisions of 11 MLBSA § 9 . . .

* * * *

§ 13. Law enforcement and natural resources officers; powers

Any duly authorized law enforcement officer or natural resources officer of the Non-Removable Mille Lacs Bands of Chippewa Indians is hereby authorized to take all action to the extent of their authority that may be necessary or proper for the enforcement of Subchapters I and II of this chapter, regulations, standards, directives, stipulation agreements, variances, schedule of compliance or permits.

* * * *

§ 15. Civil penalties

(a) Any person subject to the jurisdiction of the Band who violates any provision of Subchapter I or II of this chapter or any provision of any federal law enacted for the protection of the environment which is incorporated by reference into this chapter, or any standard regulation, variance, directive, stipulation agreement, schedule of compliance or permit issued or adopted by any environmental protection agency of government shall forfeit and pay to the Band a penalty, in an amount to be determined by the court, of not more than *five thousand dollars per day of violation.*

Mille Lacs Band Statutes Annotated, VOLUME I at 357-365 (emphasis added).

EXHIBIT 3

EXCERPTS FROM THE MILLE LACS BAND STATUTES ANNOTATED, VOLUME I.

2. NATURAL RESOURCE PROTECTION CODE, TITLE II

§ 2001. Definitions

* * * *

(n) Mille Lacs Reservation-shall mean *all land within the exterior boundary described in the Treaty of 1855*, to wit:

> *"the following fractional townships, viz: forty-two north, of range twenty-five west; forty-two north, of range twenty-six west; and forty-two and forty-three north, of range twenty-seven west; and also, the three islands in the southern part of Mille Lacs, exterior boundary of Sandy Lake Reservation as described in the Treaty of 1855, all contiguous waters, and all other trust properties under the jurisdiction of the Mille Lacs Band, its enrolled members, and of the Minnesota Chippewa Tribe and delegated to the Non-Removable Mille Lacs Band of Chippewa Indians."*

(o) Motor Vehicle . . .

(p) Non-Band Fishing License . . .

(q) Non-Band Hunting License . . .

(r) Non-Band Ricing License . . .

(s) Non-Game Fish . . .

(t) Non-Indian Fishing License . . .

(u) Non-Indian Hunting License . . .

(v) Non-Indian Ricing License . . .

* * * *

(bb) Protected Wild Animals . . .

(cc) Small Game . . .

(dd) Special Permit . . .

(ee) Taking or Hunting . . .

(ff) Transport or Transportation . . .

(gg) Wild Animals . . .

(hh) Wild Rice . . .

§ 2002. Powers of Commissioner of Natural Resources

The Commissioner of Natural Resources shall have powers of regulation over *all matters of land, air, water, environmental protections and anything and everything related to the conservation and protection of natural resources under the jurisdiction of the Mille Lacs Band of Chippewa Indians.*

(a) He shall have *power to open and close all seasons for hunting, fishing, trapping, and the gathering* of wild rice by the issuance of a Commissioner=s Order with the concurrence of the Spiritual Advisor on all matters related to his duties.

(b) He shall be responsible for the development of a natural resource management plan and *certify to the feasibility of all economic development plans which involve the natural resources with the concurrence of the Spiritual Advisor.*

(c) He shall have the power to make any and all regulations for the taking, possession and transportation of wild animals, fish, bird or grain from trust territory under the jurisdiction of the Band.

(d) The Commissioner shall not possess authority over law enforcement officials under the jurisdiction of the Band.

(e) The Commissioner may *do all things deemed by him as desirable in the preservation, protection and propagation in their natural state of all desirable species of wild animal, bird, or fish upon the concurrence* of the Spiritual Advisor.

(f) The Commissioner shall have the power to acquire through gift, lease, purchase, in the name of the Band, lands or any interest in lands deemed suitable for the future interests of the Band.

(g) He shall have power to negotiate contracts in the furtherance of natural resource development within the jurisdiction of the Band.

(h) He shall have authority to secure funds from the government of the United States or any private foundation for the purpose of fulfilling his legal mandate.

Mille Lacs Band Statutes Annotated, VOLUME I at 394-398 (emphasis added).

APPENDIX K

AMENDED COMPLAINT (8/28/72)

I

INTRODUCTION

(1) This is an action commenced by the Rosebud Sioux Tribe of Indians, of Rosebud, South Dakota, seeking declaratory judgment to ascertain the meaning of certain acts of Congress which define the boundaries of the Rosebud Indian Reservation

II

JURISDICTION

(2) Jurisdiction is founded upon 28 U.S.C.A. § 1362. This is an action pursuant to 28 U.S.C.A. § 2201 and § 2202 seeking to declare the rights and legal relations among the parties hereto.

III

(3) The Plaintiff, Rosebud Sioux Tribe of Rosebud South Dakota is a tribe of American Indians, recognized as such by the United States of America and, thereunder, by the Department of the Interior. The Rosebud Sioux Tribe is organized pursuant to the Indian Reorganization Act, Act of June 15, 1935, C. 260, 49 Stat. 378, 25 USCA § 476 et seq.

(4) The Honorable Richard Kneip is the Governor and the Chief Officer for the State of South Dakota.

(5) Gordon Mydland is the Attorney General and officer of State charged with the enforcement of the laws of the State of South Dakota.

(6) The County of Mellette is a County of the State of South Dakota and is organized pursuant to the laws thereof.

(7) The County of Lyman is a County of the State of South Dakota and is organized pursuant to the laws thereof.

(8) The County of Tripp is a County of the State of South Dakota and is organized pursuant to the laws thereof.

(9) The County of Gregory is a County of the State of South Dakota and is organized pursuant to the laws thereof.

IV

FACTUAL ALLEGATIONS

(10) The Rosebud Indian Reservation had its beginning in the Treaty of Fort Laramie 1851, 11 Stat. 749, Volume I, SDCL pp 63-66.

(11) In the Fort Laramie Treaty it was provided and agreed to that the Sioux or Dahcota Nation should have a territory described as:

> commencing the mouth of the White Earth River, on the Missouri River; thence in a southwesterly direction to the forks of the Platte River; thence up the north fork of the Platte River to a point known as the Red Butte, or where the road leaves the river; thence along the range of mountains known as the Black Hills, to the headwaters of Heart River; thence down Heart River to its mouth; and thence down the Missouri River to the place of beginning.

(12) The Sioux Treaty of 1868, 15 Stat. 635, Volume 1, SDCL pp 103-112, reduced the size of this territory when it established a new area for the Sioux Nation:

> The United States agrees that the following district of country, to wit, viz: commencing on the east bank of the Missouri River where the forty-sixth parallel of north lititude crosses the same, thence along low-water mark down said east bank to a point opposite where the northern line of the State of Nebraska strikes the river, thence west across said river, and along the northern line of Nebraska to the one hundred and fourth degree of longitude west from Greenwich, thence north on said meridian to a point where the forty-sixth parallel of

north latitude intercepts the same, thence due east along said parallel to the place of beginning; and in addition thereto, all existing reservations on the east bank of said river shall be, and the same is, set apart for the absolute and undisturbed use and occupation of the Indians herein named, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit amongst them; and the United states now solemnly agrees that no persons except those herein designated and authorized so to do, and except such officers, agents, and employees of the Government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law, shall ever be permitted to pass over, settle upon, or reside in the territory described in this article, or in such territory as may be added to this reservation for the use of said Indians, and hence-forth they will and do hereby relinquish all claims or right in and to any portion of the United States or Territories, except such as is embraced within the limits aforesaid, and except as hereinafter provided.

(13) Finally, the Rosebud Reservation as a single entity was created by the Treaty of 1889, an Act to divide the Reservation of Sioux Indians into separate reservations, 25 Stat. 888, Volume 1, SDCL pp 121-137.

(14) The newly created Rosebud Agency was established as:

Commencing in the middle of the main channel of the Missouri River at the intersection of the south line of Brule County; thence down said middle of the main channel of said river to the intersection of the ninety-ninth degree of west longitude from Greenwich; thence due south to the forty-third parallel of the latitude; thence west along said parallel to a point due south from the mouth of Black Pipe Creek; thence due north to the mouth of Black Pipe Creek; thence down White River to a point intersecting the west line of Gregory County extended north; thence south on said extended west line

> of Gregory County to the intersection of the south line of Brule County extended west; thence due east on said south line of Brule County extended to the point of beginning in the Missouri River, including entirely within said reservation all islands, if any, in said river.

(15) In the Act of April 23, 1904, Ch 1484; 33 Stat. 254, Volume 1, SDCL pp 152-159, the Congress of the United States acted to allow non-Indian homestead in a portion of the Rosebud Reservation wholly found within the County of Gregory. The act affected that portion of the Rosebud Reservation described as:

> Commencing in the middle of the main channel of the Missouri River at the intersection of the south line of Brule County; thence down said middle of the main channel of said river to the intersection of the ninety-ninth degree of west longitude from Greenwich; thence due south to the forty-third parallel of latitude; thence west along said parallel of latitude to its intersection with the tenth guide meridian; thence north along said guide meridian to its intersection with the township line between townships one hundred and one hundred and one north; thence east along said township line to the point of beginning, the unallotted land hereby ceded approximately four hundred and sixteen thousand (416,000) acres, lying and being within the boundaries of Gregory County, South Dakota, as said county is at present defined and organized.

(16) In the Act of March 2, 1907, Ch. 2536; 34 Stat. 1230, Volume 1, SDCL pp 159-162, the Congress of the United States acted to allow non-Indian homestead in a portion of the Rosebud Reservation, being the whole of Tripp County and a part of Lyman County. The act affected that portion of the Rosebud Reservation described as:

> That portion of the Rosebud Indian Reservation in South Dakota lying south of the big White River and east of Range Twenty-five west of the sixth principal meridian.

(17) In the Act of May 30, 1910, Ch. 260; 36 Stat. 448, Volume 1, SDCL—167-172, the Congress of the United States acted to allow non-Indian homestead in that portion of the Rosebud Reservation that now makes up the County of Mellette.

(18) All areas within the present boundaries of the Rosebud Sioux Indian Reservation, wherever they may be, are "Indian Country" as defined by USCA § 1151.

(19) Within the areas of "Indian Country" of the Rosebud Sioux Indian Reservation, the Plaintiff has exclusive criminal jurisdiction, excepting for those crimes defined in 18 USCA § 1152, over all Indians to the exclusion of the Jurisdiction of the Defendants.

(20) Within the areas of "Indian Country" of the Rosebud Sioux Indian Reservation, the Plaintiff has exclusive jurisdiction over all civil matters affecting Indians to the exclusion of the jurisdiction of the Defendants.

(21) At this time, in those portions of Gregory, Tripp, Lyman and Mellette Counties within the Rosebud Reservation in which non-Indian homestead has been allowed, the State of South Dakota and the particular named Counties are exercising their criminal and civil jurisdiction over American Indians therein. This exercise of criminal and civil jurisdiction by the defendants is to the exclusion of the plaintiff's criminal and civil jurisdiction, as if the whole of these areas were not "Indian Country" as defined by the laws of the United States.

(22) All of the Rosebud Reservation, as described in the Sioux Treaty of 1889 is still "Indian Country" as defined by the laws of the United States, and none of the three homestead Acts, allowing non-Indian homestead within the Rosebud Sioux Indian Reservation, reduced the size of the Rosebud Sioux Indian Reservation.

Wherefore, the Plaintiff prays this Court to declare:

A. That the Act of April 23, 1904, Ch. 1484; 33 Stat. 254, allowing non-Indian homestead within that portion of the Rosebud Sioux Indian Reservation that constitutes Gregory County, did not reduce the size of the Rosebud Reservation and that the portion of Gregory County affected by the Act of April 23, 1904, remained "Indian Country" as defined by the laws of the United States depriving the defendants of all civil and criminal jurisdiction over Indians therein.

B. That the Act of Marc[h] 2, 1907, Ch. 2536, 34 Stat. 1230, allowing non-Indian settlement in a portion of the Rosebud Indian Reservation affecting Tripp and Lyman Counties did not reduce the size of the Rosebud Reservation and that the portions of Tripp and Lyman Counties affected by the Act of March 2, 1907, remained "Indian Country" as defined by the laws of the United States depriving the defendants of all civil and criminal jurisdiction over Indians therein.

C. That the Act of May 30, 1910, Ch. 260; 36 Stat. 448, allowing non-Indian settlement in a portion of the Rosebud Indian Reservation affecting Mellette County did not reduce the size of the Rosebud Reservation and Mellette County as affected by the Act of May 30, 1910, remained "Indian Country" as defined by the laws of the United States depriving the defendants of all civil and criminal jurisdiction over Indians therein.

D. The Plaintiff further prays for its cost and disbursements herein and for such other relief as the Court may deem just.

Dated this 25th day of August, 1972.

APPENDIX L

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Civil No. 02-407 JMR/RLE

COUNTY OF MILLE LACS and
FIRST NATIONAL BANK OF MILACA,
Plaintiffs,

vs.

MELANIE BENJAMIN, *et al.*,
Defendants.

INDEX TO EXHIBITS TO PLAINTIFF COUNTY OF MILLE LACS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT (NON-MERITS DEFENSES)

Exhibit #	Document
1)	Mille Lacs Band Statutes Annotated
2)	Letter from Hatch to Courteau (8/9/99)
3)	Letter from Carlson to Windahl (11/27/95)
4)	Brief of Cities, et al., Amici Curiae, in Support of Petitioners, State of South Dakota v. Yankton Sioux Tribe (No. 99-1490)
5)	Complaint for Declaratory Judgment, *County of Mille Lacs v. Melanie Benjamin, et al.*
6)	*City of New Town v. U.S.*, Memorandum and Order (Jan. 26, 1971)

7) Amended Complaint, *City of New Town v. U.S.*, Civil No. 1038

8) Amended Complaint, *Rosebud Sioux Tribe v. Kneip* (8/28/72)

9) Affidavit of Dr. Bruce A. Schroeder (11/1/02)

10) Affidavit of Cinda J. Schroeder (11/1/02)

11) Affidavit of Frank Courteau (11/8/02) w/Exhibits:

a) Onamia Roadway Documents

b) Letter from Genia to Fahey (2/12/99)

c) Gahbow State of the Band Address (1/14/89)

d) Letter from Johnson to Freeman (4/3/89)

e) Letter from Smith to Thurber (4/28/98)

f) Marge Anderson, "Sovereignty provides the framework for understanding tribal governments," May 30-31, 1996

g) Statement of Marge Anderson before the U.S. Senate Committee on Indian Affairs

h) Mille Lacs Band Brochure

i) Letter from Wedll to Holm (1/22/99)

j) MLB Response to State Objections to the Band's Application for Treatment as a State Under the Clean Water Act and Safe Water Drinking Act (10/19/89)

k) Letter from Althman to Kiel (5/3/00)

l) Letter from Melissa Hill (3/23/92), Vendor License

m) Letter from Courteau to Benjamin (1/16/01)

n) Archaelogical Survey Permit

o) Testimony of Melanie Benjamin before the U.S. Senate Committee on Indian Affairs (6/19/01)

p) Subsidized Work Experience Agreement (Students)

q) Letter from Beeman to Kehl (10/15/02)

r) Frank Courteau, "Answers to Complicated Questions," Mille Lacs Messenger (10/9/02)

s) Letter from Guenther to Jevne (10/24/02)

t) Agreement between Minnesota & the Mille Lacs Band (9/22/97) (State Tax Agreement)

u) Joel Patenaude, "Reservation Lawsuit must be disclosed to buyers," Mille Lacs Messenger (7/31/02)

v) Comprehensive Land Use Plan (Adopted 10/23/01)

w) Indiancountry.com Articles (3)

x) Joel Patenaude, "Tribes seek full sovereignty from Congress," Mille Lacs Messenger (5/1/02)

12) Affidavit of Dennis Boser (11/1/02) w/tickets

13) Affidavit of Douglas Edward Lien (11/1/02)

14) Affidavit of Barbara Kay Kiel (11/1/02)

14a) Affidavit of Barbara Kay Kiel (11/1/02)

15) Affidavit of David Tellinghuisen (11/1/02)

16) Affidavit of Tom Tobin (11/11/02) w/Exhibits:

a) Deposition of Melanie Benjamin (9/24/02)

b) Deposition of Janice Big Bear (9/26/02)

c) Deposition of Don Wedll (9/25/02)

d) Deposition of Sidney Lucas (9/24/02)

e) Letter from Morrin to Courteau (8/24/01)

17) Affidavit of Leo Vos (10/31/02)

18) Affidavit of Philip Thompson (11/7/02) w/Exhibits:

a) Memorandum from Rick Wuori to County Treasurer re: Property Taxes for Indian-owned Lands (9/17/02)

b) Minnesota Session Laws 2002, "An Act Relating to Elections"

c) MN Voter Registration Cards

19) Affidavit of Janice Kolb (11/8/02)

Dated this 16th day of January, 2003.

TOM D. TOBIN

Pro Hac Vice, SD No. 1294
TOBIN LAW OFFICES, P.C.
P.O. Box 730
Winner, SD 57580-0730
(605)842-2500

Attorney for County of Mille Lacs

Subscribed and sworn to before me this 16th day of January, 2003.

Notary Public

My Commission Expires:

(SEAL)

APPENDIX M

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Civil No. CV 02-407 JMR/RLE

COUNTY OF MILLE LACS,
Plaintiff,

vs.

MELANIE BENJAMIN, *et al.*,
Defendants.

AFFIDAVIT OF FRANK COURTEAU

Frank Courteau, being first duly sworn, states under oath:

1. My name is Frank Courteau, I was born in 1954, and from approximately 1956 until 1964 I lived in the City of Onamia, in Mille Lacs County. My family built a home on the south shore of Lake Mille Lacs where I lived from about the age of 10 until I was 14, in 1968.

2. In 1968 I attended St. John's Prep School at Collegeville, Minnesota. In 1969 my parents committed to three (3) years of medical missionary work and my family moved to Los Angeles, California, where my parents were in preparation training while I attended St. Bernard's High School. In 1970 my family moved to Rhodesia (now Zimbabwe), Africa, where I attended Marist Brothers College in Que Que from 1970 until 1972.

3. I then attended and graduated from the College of St. Thomas, St. Paul, Minnesota, from 1972-1976. During college I worked part-time for Sears & Roe-

buck, and following graduation I became employed full-time by Sears.

4. In 1979 my wife and I moved to Seattle, Washington, where I became employed by the Pay'n Save Corporation as Store Detective Supervisor. Within a year I was promoted to Regional Loss Prevention Manager, was transferred to the company's Oregon office, then Hawaii office, and then promoted again, to Assistant Loss Prevention Director and returned to Seattle, the company's corporate office, in 1984. In 1986 I became Director of Loss Prevention for Ernst Home Centers, Inc., Seattle, Washington, where I worked until 1989.

5. In 1989 I returned with my family to Onamia, Mille Lacs County, Minnesota, where I became self-employed as owner/operator of a B & B Inn, and also as a custom furniture builder and picture-framer. We currently reside in South Harbor Township, on the Southwest side of Lake Mille Lacs. I have lived at this location, and in this house since I built it in 1989. From 1968 until 1989 I visited family and others regularly within Mille Lacs County.

6. In 1997 I was elected to the Mille Lacs County Board of Commissioners and assumed office in early 1998. For the past two years I have represented the board on various committees, including the Mille Lacs Band Committee. During 1998 this Committee (myself and Commissioner Roger Neske) met numerous times over many months with representatives of the Mille Lacs Band in our search of a comprehensive resolution to our jurisdictional differences. In November, 1998, following failed negotiations, I was asked by the Board to serve as the county's spokesman on the reservation dispute with respect to any print media and other inquiries that might be made. Since the

beginning, during negotiations, and since, I have spent a great deal of my time researching and responding to the many questions that have arisen vis a vis the significance of the issue.

7. In my capacity as Mille Lacs County Commissioner and as spokesperson for the Commission on the issue of the 1855 Reservation, I have discussed this issue with great numbers of my constituents. In general, those discussions substantiate that until recently the only "reservation" familiar to most of the constituents in this area is the area surrounding Vineland and a separate and distinct housing area near Isle, the trust lands. These areas have been loosely referred to as "the reservation" or "the trust lands." In general, my constituents have become familiar with the exterior boundaries of the 1855 Reservation only recently.

8. In my capacity as Mille Lacs County Commissioner and as spokesperson for the Commission on the issue of the 1855 Reservation, I have obtained and been given documents from other County offices, local subdivisions, my constituents and others that pertain to this issue.

9. In general, this documentation has confirmed that the Mille Lacs Band has been active in several areas seeking to reestablish the boundaries of the 1855 Reservation. To the extent the Commissioner realized this was the unstated goal of the Band, the Commission has never agreed with the Band with reference to the 1855 Reservation or taken any action that would knowingly compromise or otherwise jeopardize the right of the County to legally resist the Band's action in this respect.

10. One example of this documentation is recounted in the August 13, 2002, correspondence from Jerome J. Athman, Clerk of Onamia Township. Mr. Athman

confirmed the experience of many residents in this area with reference to tribal claims regarding the existence of the 1855 Reservation. In attempting to repair a common roadway between the City of Onamia and adjoining townships this year, township officials were advised by the Corp of Engineers that because of the Band's claim regarding the Indian reservation status of the area on the north side of the road, it would have to be dealt with differently than the area on the south side of the road, which was not within the 1855 Reservation. The project also required tribal and state archeological and historical permits and tribal easements for the north side of the road. A true and correct copy of Mr. Athman's correspondence is attached to this Affidavit as Exhibit A.

11. I have reviewed the deposition of Mr. Don Wedll. I know Mr. Wedll and the Band have relied on the existence of the 1855 Reservation in refusing to comply with County Zoning Ordinances for the last several years. Mr. Wedll is a long time Band employee and now the Special Assistant to the Chief Executive for the Mille Lacs Band. In addition, Mr. Wedll has maintained in deposition and in declaration that, in the past, Mille Lacs County orally agreed not to enforce zoning restrictions on Band owned fee land. Band Special Assistant Wedll is mistaken. See Aff. of Douglas Lien, former Zoning Administrator for Mille Lacs County, from 1982 to 1987; also see Aff. of Barbara Kay Kiel, current Zoning Administrator for Mille Lacs County, from 1996 to present; also see Aff. of Elmer Warolin.

12. Subsequent to Mr. Wedll's deposition and declaration, Mille Lacs County contacted the individuals that would be in the best position to confirm or deny Mr.

Wedll's recollections. Relevant excerpts from Mr. Wedll's deposition and declaration were provided to them. Without exception, everyone agreed that Mr. Wedll is clearly mistaken.

13. Mr. Douglas Lien, former Zoning Administrator for Mille Lacs County, from 1982 to 1987, was not a county official in Mille Lacs County "in the early 1990's," the time period in which Mr. Wedll claims to have reached an understanding with him. Lien Aff. at 1. Moreover, Mr. Lien does recall general discussions with Mr. Wedll prior to that time. However, by affidavit Mr. Lien explains in detail all of the reasons that support the position that Band Special Assistant Mr. Wedll is clearly mistaken. Lien Aff. at 1.

14. Ms. Barbara Kiel is the current Zoning Administrator for Mille Lacs County. She has been employed by Mille Lacs County since 1981 in various capacities, and has been Zoning Administrator since 1996. Ms. Kiel also reviewed the deposition and declaration of Mr. Wedll. Zoning Administrator Kiel agrees with former Zoning Administrator Lien that Mr. Wedll is clearly mistaken. In addition, Ms. Kiel also details the reasons and documentation that supports her conclusions in this respect. Barb Kiel Aff. at 1-2. Moreover, Zoning Administrator Kiel is personally aware that the former Mille Lacs County Zoning Administrator Piasecci confirmed with the Band in writing that zoning on Band fee property must receive the appropriate permits and authorization from the County. Kiel Aff. at 2. For these reasons, Zoning Administrator Kiel agrees that Band Special Assistant Wedll must be mistaken.

15. In general, Zoning Administrator Kiel, in her deposition and her affidavit also recounted that in her

experience, in recent years the Mille Lacs Band has consistently attempted to ignore County zoning requirements. As a result, Band actions have disrupted normal operating procedures in her office. In addition, in each of those instances her office took the necessary action to enforce Mille Lacs County zoning ordinances.

16. At all times, I have been kept informed by Ms. Kiel of these developments. I was also made aware of the Band's 1999 letter challenging the authority of Mille Lacs County. In 1999, after having again been advised by Mille Lacs County of Mille Lacs County's authority to impose and enforce its zoning regulations on Band owned land, the Solicitor General for the Mille Lacs Band, James M. Genia, challenged Mille Lacs County:

> [T]he county has no authority to impose or enforce its zoning regulations upon Band owned land. Both the United States Supreme Court and the Minnesota Supreme Court have held that states and local units of government are without authority to enforce regulatory laws against tribes unless Congress has expressly given states and local units of government that authority. *See generally*, *California v. Cabazon Band of Indians*, 480 U.S. 202 (1987), *Bryan v. Itasca County*, 426 U.S. 373 (1975), *State v. Stone*, 572 N.W.2d 725 (Minn. 1997).

Letter from James Genia, Solicitor General, Mille Lacs Band of Ojibwe, to Jennifer Fahey, Mille Lacs County Attorney (2/12/99) Exh. B.

17. Pursuant to this letter by Band Solicitor General Genia, the Band continued to ignore County zoning requirements in a number of instances. As a result, the Zoning Administrator referred the violations to the

Office of the Mille Lacs County Attorney. After several attempts to resolve several outstanding violations, the Band was successful in ultimately delaying a resolution of the matter for a time.

18. Band zoning violations continued in this posture until the fact that Mille Lacs County was considering litigation to resolve the 1855 Reservation status question became generally known. At that time, and during or immediately after unsuccessful negotiations, the Mille Lacs Band abruptly and voluntarily ceased total opposition to County zoning and opted to comply, under protest, with most Mille Lacs County ordinances by submitting appropriate documentation, under protest, for County consideration and approval.

19. However, certain land use and conditional use permits required for the Band's waste water treatment plant were not resolved in this process. Band attorneys initially decided not to comply with the requirements of the Mille Lacs County zoning ordinance, per the understanding of the County Zoning Office. On February 20, 2002, when the County filed suit in this action, various land use and conditional use permits for the waste water treatment plant the Band intended to build were not in compliance with County zoning requirements. Keil Deposition.

20. In this general time frame (within a year or so), the Band also circulated Draft Band Zoning Ordinance that encompassed all land including non-Indian fee lands, within the 1855 Reservation. At some point, this Draft Band Zoning Ordinance was formally approved by the Band. Again, at approximately the same time the public learned that Mille Lacs County was considering litigation, the Mille Lacs Band also abruptly "repealed" this Band Zoning Ordinance. *Id.* According to the deposition of Band Special Assistant

Wedll in this litigation, the "repeal" was prompted only by the fact that the approval for the Ordinance was defective. Although many months have since passed, Mille Lacs County is not aware of any action the Band has taken to correct the purported defect or otherwise reinstate the Ordinance.

21. The most recent example of a dispute that centers on the existence of the 1855 Reservation occurred on Tuesday, November 5, 2002, with reference to the election on that day. Minnesota Session Laws provide special consideration for tribal band members living on an Indian reservation with reference to voter registration and identification. Mille Lacs County Auditor-Treasurer, Philip Thompson, has filed an Affidavit in this case, together with two exhibits that substantiate the problem in Mille Lacs County, Exhibit B and Exhibit C to Philip Thompson's Affidavit. As these exhibits attest, a number of Mille Lacs Band members living within the 1855 Reservation claim to be "living on an Indian reservation" by exercising the right of tribal members living on an Indian reservation to utilize Subsection 5, Special Registration Allowances. These same registration cards establish that many, if not all of these individuals claimed residences that are not on tribally owned or other trust land.

22. Some of the other documents referred to above that I have utilized, reviewed and relied upon include:

    A) Arthur Gahbow, State of the Band Address (1/14/89) Exh. C

    B) Letter from Tadd Johnson, Solicitor General, Mille Lacs Band of Ojibwe, to Richard Freeman, Environmental Protection Agency (4/3/89) Exh. D

C) Letter from Claricy Smith, Acting Area Director, Bureau of Indian Affairs, to Howard Thurber (4/28/98) Exh. E

D) Marge Anderson, "Sovereignty provides the framework for understanding tribal governments," American Indian Research and Policy Institute Forum Report (5/30/96) at 4. Exh. F

E) Marge Anderson, Statement on Tribal Sovereign Immunity before the United States Senate Committee on Indian Affairs (10/8/96) Exh. G

F) Mille Lacs Band of Ojibwe Brochure Exh. H

G) Letter from Don Wedll, Commissioner of Natural Resources, Mille Lacs Band of Ojibwe, to Traci Holm, Zoning/Environmental Services, Mille Lacs County (1/22/99) Exh. I

H) Mille Lacs Band of Chippewa Indians Response to State Objections to the Band's Application for Treatment as a State Under the Clean Water Act and Safe Drinking Water Act (10/19/89) Exh. J

I) Letter from Adam Altman, Solicitor General, Mille Lacs Band of Ojibwe, to Barbara Kiel, Zoning Administrator, Mille Lacs County (5/3/00) Exh. K

J) Letter from Melissa Hill, Corporate Administrator, Mille Lacs Band of Ojibwe (3/23/92) Exh. L

K) Letter from Frank Courteau, Mille Lacs County Commissioner, to Melanie Benjamin, Chief Executive, Mille Lacs Band of Ojibwe (1/16/01) Exh. M

L) Archaelogical Survey Permit. Exh. N

M) Melanie Benjamin, Testimony before the United States Senate Committee on Indian Affairs (6/19/01) Exh. O

N) Mille Lacs Band of Ojibwe Indians Employment and Training Program Subsidized Work Experience Agreement (students) Exh. P

O) Letter from Michelle Beeman, DNR Legislative Affairs Director, to Stella Kiel (10/15/02); Letter from George Goodwin, Executive Director, Minnesota Chippewa Tribe to R.W. Mayotta, Superintendent, Minnesota Agency (2/11/81); Memorandum from Richard A. Dahlman, Onamia District Forester, to District and Area File (8/19/80), Exh. Q

P) Frank Courteau, "Answers to Complicated Questions," *Mille Lacs Messenger*, (10/9/02) at 10 Exh. R

Q) Letter from John Guenther, Regional Director, Minnesota Department of Natural Resources to Mary Jevne (10/24/02) Exh. S

R) Agreement between the State of Minnesota and the Mille Lacs Band of Ojibwe Indians (signed 9/22/97) Exh. T

S) Joel Patenaude, "Reservation lawsuit must be disclosed to buyers," *Mille Lacs Messenger*, (7/31/02), at 3 Exh. U

T) Comprehensive Land Use Plan, Mille Lacs Band of Ojibwe (Adopted 10/23/01) Exh. V

23. In my capacity as Mille Lacs County Commissioner and as spokesperson for the Commission on the issue of the 1855 Reservation, I also keep abreast of national issues that relate to reservation status. With reference to the intergovernmental relations of the

Mille Lacs Band, in May of 2002, the legal counsel for the Mille Lacs Band, Mr. Tadd Johnson, endorsed a national legislative initiative that flies in the face of the Band's disclaimers with reference to intent to exercise jurisdiction over non-members and over non-member fee land. That initiative is known as the "Hicks Fix." A true and correct copy of the articles describing the Hicks Fix are attached to this Affidavit as Exhibit W. The views of the Mille Lacs Band, including legal counsel, Tadd Johnson, are set forth in an article in the *Mille Lacs Messenger*, dated May 1, 2002. A true and correct copy is attached to this Affidavit as Exhibit X.

The articles make clear that the purpose of the legislative initiative, with tens of millions of dollars contributed by "casino rich" tribes such as Mille Lacs, is to "completely preempt state sovereignty and restore full tribal sovereignty." Within Indian reservations, Indian tribes would be vested with complete criminal and civil jurisdiction over all people and all lands, including non-members and non-member fee lands. In the process, twenty-five years of precedent from the United States Supreme Court would be negated. According to Mille Lacs Band legal counsel, Tadd Johnson, the Mille Lacs Band needs to get behind the legislative initiative. And if there were a plan to overturn these Supreme Court cases, Mille Lacs Band legal counsel, Mr. Tadd Johnson noted that the Mille Lacs Band would have an interest in getting behind that plan.

Because of the Band's claim to the existence of the 1855 Reservation, local non-members are very much concerned with this process, as they have been concerned with all other recent attempts by the tribe to exercise jurisdiction over non-members on non-member property.

24. I currently am employed as a County Commissioner for Mille Lacs County, and I was reelected for a two-year term in District 5 on November 5, 2002.

25. As a Mille Lacs County Commissioner, my job is to look out for the future interests of both the County, as well as my constituents. The claims of the Mille Lacs Band and other governing entities as indicated in the many documents attached to this Affidavit are, in my opinion, highly problematic with respect to those interests.

Dated this 8th day of November, 2002.

/s/ Frank Courteau
FRANK COURTEAU

Subscribed and sworn to before me this 8th day of November, 2002.

/s/ Philip Thompson
PHILIP THOMPSON
Notary Public

My Commission Expires:

(SEAL)

APPENDIX N

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Civil No. CV 02-407 JMR/RLE

COUNTY OF MILLE LACS,
Plaintiff,

vs.

MELANIE BENJAMIN, *et al.*,
Defendants.

AFFIDAVIT OF JANICE KOLB

Janice Kolb, being first duly sworn, states under oath:

1. My name is Janice Kolb, and I am the Mille Lacs County's Attorney Elect.

2. I was born and raised in Mille Lacs County and am a fifth generation Mille Lacs County resident.

3. For these past two years, I have been a judicial law clerk in Mille Lacs County for the Honorable Michael Jesse.

4. Prior to obtaining my law degree and my clerkship in Mille Lacs County, I was employed as a paralegal and law clerk for ten and a half years in a private law firm.

5. For some time, I have been generally aware of the substance of the correspondence of my predecessor, dated January, 2000, regarding the significance of reservation status. I have also recently reviewed this correspondence in detail. In view of the demographics in this area, I think that the "Indian country"

consequences are considerably more complex and problematic, far less clear, than the January, 2000, Memorandum would indicate.

6. I intend to formally advise the Board of Commissioners of Mille Lacs County of my views in writing and in person as soon as I take Office.

Dated this _____ day of November, 2002.

_____
JANICE KOLB

Subscribed and sworn to before me this _____ day of November, 2002.

_____
Notary Public

My Commission Expires:

(SEAL)

APPENDIX O

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 50504-3590

REPLY TO THE ATTENTION OF R-19J

MAR 08 2004

Sheryl A. Corrigan, Commissioner
Minnesota Pollution Control Agency
520 Lafayette Rd. N.
St. Paul, Minnesota 55155-4194

Dear Ms. Corrigan:

Thank you for your letter of December 23, 2003, regarding the U.S. Environmental Protection Agency's (U.S. EPA) inspection of underground storage tanks at the Trout Junction facility in Onamia, Minnesota, and Tribal boundary issues regarding the townships of Kathio, South Harbor, and Isle Harbor. The United States Department of Interior, through the Bureau of Indian Affairs and the Solicitor's Office, is responsible for making determinations regarding reservation boundaries. The Department of the Interior has taken the position that the boundaries of the Mille Lacs Reservation, as defined by the Band's Treaty of 1855, remain intact. We enclose two letters that set forth in detail the Solicitor's Office opinion and which U.S. EPA has consistently and publicly referenced when responding to questions regarding the boundary of the Mille Lacs reservation. The U.S. EPA relies upon the Solicitor's Office opinion in administering Federal environmental programs for the Mille Lacs Reservation. Therefore, we must disagree with your charac-

terization that the fee land areas within the Mille Lacs Reservation are "disputed." The U.S. EPA's position is that these areas discussed in your letter are within "Indian Country" as that term is defined in 18 U.S.C. § 1151(a).

In your letter, you requested that when we perform inspections on Tribal lands, Region 5 will: 1) notify the State where and when we will be conducting inspections; 2) invite the State to participate; and 3) copy the State on all correspondence related to the inspections. As you know, Region 5 and each State environmental agency have agreed to procedures for communicating U.S. EPA enforcement activities conducted within a State. These procedures are referred to in the Memorandum of Agreement entered into as part of the UST State program approval process for Minnesota. This agreement was based on a national model agreement. This process has served well to involve State agencies in U.S. EPA enforcement activities within the scope of a State's authorized program.

Similarly, Region 5 has developed a Civil Enforcement and Compliance Assistance in Indian Country, Questions and Answers Document. This document is based on U.S. EPA's National Guidance on the Enforcement Principles outlined in the 1984 Indian Policy. A copy of the Region 5 guidance, which includes as Attachment A the National Guidance, is enclosed for your information. This document outlines Region 5's principles for consulting and communicating with Federally recognized tribes as we carry out our compliance monitoring and enforcement responsibilities in Indian Country.

In this document, Region 5 states that it will notify the specific Tribal Government of our inspections, invite the Tribe to participate in the inspection, and keep the Tribal Government informed of overall compliance issues. Region 5 acknowledges that there may be some cases where Tribal Goverments and States may wish to cooperate in carrying out

their respective environmental programs. In our Communications Plan, we inform the tribe that it is their decision to invite the State to participate in a Region 5 inspection within Indian Country. We will continue to conform to the Region 5 Civil Enforcement plan and National Guidance for enforcement activities within Indian Country. This means that we cannot agree to your suggestions insofar as Indian Country is concerned. However, we recognize the interest MPCA may have in responding to questions from its citizens. The Underground Storage Tank program will remain available to address any particular questions or issues as they may arise. Region 5 also is willing to explore the possibility of facilitating future discussions between the MPCA and the Mille Lacs Band regarding the State's requests raised in this letter. Please let me know if you would like us to facilitate such a meeting.

I appreciate your continuing efforts to work in partnership with the U.S. EPA to ensure protection of human health and the environment in Minnesota. I hope this information is helpful, please contact me if you have any further questions about this matter.

Very truly yours,

Thomas V. Skinner
Regional Administrator

Enclosures

APPENDIX P

Answers to Complicated Questions

In the 9-18-02 Mille Lacs Messenger, the Commissioner of Administration for the Mille Lacs Band of Ojibwe, Sheldon Boyd, provided "brief answers to some complicated questions" about the significance of reservation status that had been asked earlier by another reader. Unfortunately, the answers provided were far too simplistic, and very misleading as a result.

First, with respect to jurisdiction, the reader asked if tribal members were exempt from municipal ordinances and court systems if the reservation exists. Mr. Boyd's simple answer was no, that under Public Law 280 the state of Minnesota and Mille Lacs County have criminal jurisdiction over Mille Lacs Band members on (as well as off) the reservation.

Public Law 280 is a federal law that gives several states, including Minnesota, criminal jurisdiction on Indian reservations. While Mr. Boyd failed to make any mention of the Band's goal in connection with PL 280 retrocession, his precise comments with respect to PL 280 are accurate. However, he also failed to mention something else that is very important. In 1997 the Minnesota Supreme Court ruled in "*State v. Stone*" that the State (and its political subdivisions . . . county, city, townships) "lacks jurisdiction under Public Law 280 to enforce civil/regulatory statutes against tribal members for conduct occurring within the boundaries of their reservation". Examples the court gave in its ruling of what is considered "civil/regulatory" included failure to provide motor vehicle insurance, proof of insurance, driving with an expired registration, driving with an expired driver's license, speeding, driving with no seat belt, and failure to have a child in a child restraint seat.

There are also other statutes and ordinances that are certainly "civil/regulatory", not criminal in nature, and therefore

not subject to PL280. In 1999, for example, the Band's Solicitor General informed the County in writing that "the county has no authority to impose or enforce its zoning regulations upon Band owned land". Reservation status was the reason given as the basis for this claim.

Despite Mr. Boyd's incomplete answer, there is no doubt that if the reservation exists then the state and its political subdivisions lack some "civil/regulatory" enforcement authority over the Band and its' members and property they might own on the reservation. If the 1855 reservation continues to exist, then tribal members and the property they might own in the disputed territory will claim they are not subject to applicable state, county, city or township civil/ regulatory jurisdiction, including but not limited to zoning, driving without a license, speeding, etc., but rather to tribal law and jurisdiction. In addition, tribal members living on the reservation are exempt from state income tax.

Second, also with respect to jurisdiction, the reader asked about tribal government jurisdiction, including taxation authority, over non-members on the reservation. In his response, Mr. Boyd stated that the Band has neither a zoning ordinance, nor harbors any intention to either tax non-Indians or zone non-Indian fee land on the reservation. Boyd referenced two United States Supreme Court decisions ("Atkinson" & "Brendale") in support of his comments.

In October, 2001, a comprehensive tribal zoning ordinance was, in fact, adopted by the Band. That ordinance expressly stated that it would be binding in "all areas" under the "control" of the Band. It has since been annulled, perhaps because of the lawsuit (if the Band defendants are successful in convincing the Court there is no current "live controversy", then it's possible the Judge could dismiss the federal case. There is no doubt the legal documents filed by the Band make clear the Band is desperately seeking to have the case dismissed).

Readers might also be interested in knowing that the Comprehensive Land Use Plan that the Band adopted on the same date as the tribal zoning ordinance, and whose status is unknown, stated "control relates to the land, not necessarily who owns the land, it applies to Band members and all others within the areas controlled by the Ordinance".

While Mr. Boyd was correct in stating the "Brendale" decision "limits tribes from applying their zoning laws to property owned by non-Indians on the reservation", the decision does not preclude the exercise of that authority in all circumstances, as readers may have been led to believe. Tribal authority could apply if the area in question is predominantly owned and occupied by tribal members. For example, the Messenger has carried coverage of the case involving Mr. Keck Melby, a non-Indian on the Grand Portage reservation who found himself subject to tribal government zoning authority. Certainly Band officials are aware of this case and its jurisdictional significance. The current Solicitor General of the Mille Lacs Band, Mary Al-Balber, served as a Judge of the Grand Portage Tribal Appellate Court, and participated in that court's decision in finding the tribe there had the right to regulate Mr. Melby.

Left unexplained in Mr. Boyd's responses to this same question was any mention of the Band's statute on environmental protection that has been enacted, and that as written, "shall extend to all persons, political subdivisions and their officers and agents, public or private corporations, associations, partnerships and any other individuals or entities who shall violate the environmental protection laws of the Band within the exterior boundaries of the Mille Lacs and Sandy lake Reservations. . . ." Also left unexplained in terms of jurisdictional impact is a similar statute on natural resources that has also been enacted by the Band. The plain language of these statutes clearly claims the right of jurisdiction over non-Band citizens.

Omitted too from Mr. Boyd's responses was any mention of the tribal reaction to recent Supreme Court decisions, including "Atkinson" and "Hicks". While true that these decisions curtail to some extent tribal jurisdiction, including taxation authority over non-members on reservations, it is equally true that tribal reaction to these decisions has been neither accepting, nor favorable.

On 9-11-01, a Tribal Leaders Forum of the National Congress of American Indians met in Washington D.C. and adopted the "Tribal Sovereignty Protection Initiative". A clearly stated goal of the "Initiative" is to "mount an organized effort to halt and reverse the United States Supreme Court's erosion of tribal sovereignty". Simply put, the tribes are not happy with how the Court has ruled on the law and, in reaction, are mounting an organized nationwide effort to get Congress to change the law, the effect being to codify in federal law tribal sovereignty in "Indian Country", including over non-members. Since Congress has plenary (total and complete) power on issues relating to Indian affairs it is possible, perhaps even likely given the financial clout of tribes to impact campaigns, that Congress could adopt legislation soon that could preclude state jurisdiction in "Indian Country", a legal term conveyed by reservation status.

In the 5-1-02 Messenger, the writer reported in a front page story that "Indian leaders across the United States are drafting legislation that would have Congress 'reaffirm tribal sovereignty' on their reservations and over non-Indian residents". Tadd Johnson, Legal Counsel of Intergovernmental Relations for the Mille Lacs Band, was quoted in the article. He said, "I think we have to get behind the legislative initiative. . . . If there's a plan to overturn these (recent Supreme Court) cases, we'd have an interest in getting behind that".

Third, the reader asked if it would be easier to put land into trust (and take it off the tax rolls) if the reservation existed. Mr. Boyd's simple answer was no, the same regulations

applied whether the land is within an existing or a former reservation. Boyd's answer is not correct, even as far as it goes. Current regulations allow a "fast track" process on fee to trust applications deemed on-reservation land. Off-reservation lands must pass a more restrictive procedure. Current regulations allow the less restrictive procedures on applications for land that once was a reservation, but has been diminished. States disagree with this rule. The regulations also allow favorable treatment for "contiguous" applications. This means a tribe could receive the less restrictive procedures for trust applications right up to historical reservation boundary lines. Then, subsequent trust applications that exist outside the reservation boundaries would receive the less restrictive treatment, regardless of the boundaries, and allowing trust lands to invade beyond historical reservation boundaries. A problem, of course, beyond the loss of tax base in connection with fee to trust transfers, is the loss of State (and county, city, township) jurisdiction on those lands.

Fourth, the reader questioned his legal status and whether his constitutional protections applied if he lived on the reservation. Mr. Boyd answered that all protections are retained, the tribes cannot exercise criminal jurisdiction, and also that if the Band were to exercise civil jurisdiction over non-Indians, it would be subject to the 1968 Indian Civil Rights Act.

With respect to the answer given by Mr. Boyd, I beg to differ. Protections for non-Indians, but especially Indian people themselves, are adversely impacted by reservation status.

Very sadly, Indian people and non-Indians living on reservations are not guaranteed the full protections of the United States Constitution in tribal courts or against tribal governments, even though they are United States citizens. The primary reason is tied to what Justice David Souter of the United States Supreme Court stated in "*Nevada v. Hicks*"

(2001): ". . . it has been understood for more than a century that the Bill of Rights and the Fourteenth Amendment do not of their own force apply to Indian tribes . . . ('Indian tribes are not states of the union within the meaning of the Constitution, and the constitutional limitations on states do not apply to tribes') Although the Indian Civil Rights Act (ICRA) of 1968 makes a handful of analogous safeguards enforceable in tribal courts . . .'the guarantees are not identical' . . . and there is a 'definite trend by tribal courts' toward the view that they have leeway in interpreting the ICRA's due process and equal protection clauses and 'need not follow the U.S. Supreme Courts precedents jot-for-jot'. . ."

Minnesota Appeals Court Judge R.A. Randall in *Cohen v. Little Six, Inc.* (1996) opined further:

> "It is not known to all reading this opinion that the following list of state and federal constitutional guarantees and rights are not in place for Minnesota Indians domiciled on a reservation: There is no guarantee that the Minnesota Constitution, the United States Constitution and its precious Bill of Rights will control. There are no guarantees that Civil Rights Acts, federal or state legislation against age discrimination, gender discrimination, etc. will be honored. There are no guarantees of the Veteran's Preference Act, no civil service classification to protect tribal government employees, no guarantees of OSHA, no guarantees of the Americans with Disabilities Act (1990), no guarantees of the right to unionize, no right to Minnesota's teacher tenure laws, no right to the benefit of federal and state 'whistleblower' statutes, no guarantees against blatant nepotism, no guarantees of a fair and orderly process concerning access to reservation housing, and no freedom of the press and no freedom of speech. In other words, all the basic human rights we take for granted, that allow us to live in dignity with our neighbors, are

not guaranteed on Indian reservations under the present version of 'sovereignty'."

In his 1998 congressional testimony Bill Lawrence, Publisher of the Native American Press, eloquently summarized the situation for reservation Indians when he said, "The greatest injustice the federal government has imposed on Indian people during the 20th century is to make us citizens, but deny us most of the basic rights of citizenship. In 1968, Congress recognized this injustice and enacted the Indian Civil Rights Act. But the U.S. Supreme Court in the poorly considered *Santa Clara v. Martinez* decision ruled, in effect, that it is up to each tribal government to decide if and to what extent reservation Indians have any civil rights".

There is a common thread that runs through the statements of Souter, Randall, and Lawrence, namely that constitutional protections are not guaranteed for people living on reservations. If today's tribal government is respecting of people's rights, tomorrow's may not . . . there is no guarantee. Except for habeas corpus (a petition to federal court concerning an arrest) an Indian on a reservation has no legal recourse for remedy if his/her civil rights are violated by his/her own tribal government. The reason . . . sovereign immunity.

The problems for non-Indians (who are legally considered "resident aliens" if they reside on the reservation), are different in some respects. In brief, as long as non-Indians don't run afoul of tribal laws or enter into contracts or business relationships with the tribe, or its' members, it could be probably safe to assume their rights as non-tribal citizens will be unaffected since they can probably avoid tribal court. If for any reason, however, they are forced into tribal court, they are then in a forum, where as Justice Souter stated, the Bill of Rights and the Fourteenth Amendment do not of their own force apply.

There is another constitutional problem with respect to non-Indians. Article IV, Section IV of the United States Constitution guarantees to every State in the Union a Republican Form of Government. This means that the citizens living in the States have a right to participate on a full and equal basis in their government. Such is not the case on Indian reservations, however, where non-tribal citizens are precluded on the basis of race and ancestry from participating in tribal government, a government that in some instances at least, currently has some legal rights under federal law to govern non-Indians on the reservation.

Fifth, the reader asked whether he could seek and gain justice if damaged by the Band, or a Band member. Mr. Boyd's answer to the question was that the Band carries insurance and that you can sue your Indian neighbor in tribal, state, or federal court if the issue is a federal matter. Notwithstanding the fact that there is no legal requirement the Band carry the insurance mentioned in the response, there was again something very important missing from the answer given by Mr. Boyd. Except in certain limited circumstances, the Band itself cannot be sued, unless it agrees it can be sued. The reason . . . sovereign immunity. Court cases are replete with examples showing tribal governments use the shield of "sovereign immunity" repeatedly & successfully, including against Indian people themselves, when tribal governments are intent on avoiding accountability.

Sixth, the reader asked what happens to the county's tax base if the reservation is resurrected. Mr. Boyd's answer was that reservation status has no effect on the county's tax base because fee lands (lands other than trust lands, ones with private title) are fully taxable.

The 61,000 acres in dispute is home to over 4000 residents. The land they occupy accounts for over 26% of the county's entire tax base.

Assuming no further lands are taken into trust, and nothing else changes with respect to what Congress might do at any time in the future, then Mr. Boyd's short answer is partially correct. Missing from his conclusion, however, is any effect to be given to the jurisdictional and other problems associated with reservation status on property values. The impact on real estate valuations remains questionable, although they are usually found to be diminished on reservations. Any diminishment of those values, or from their potential future values, will certainly have a negative effect on the county's tax base and the corresponding ability to fund government operations. Additionally, there are many stimuli that encourage tribes to put more land into trust, including the avoidance of property taxes. Legally acknowledging an expanded reservation boundary would likely encourage the Band to reconstitute the original reservation in as much trust land as possible. As the Band buys up land with casino profits, it will claim more and more ownership which it believes is consistent with regulatory authority. In light of tribal proposals to Congress to exempt tribally-owned, on-reservation fee lands from state and county jurisdiction, including taxation authority, there is serious concern that a successfully resurrected reservation could seriously impact the county's tax base in the long-term. Cities and townships could also experience negative impact since they too rely heavily on the property tax as a primary source of revenue.

Finally, the reader asked what issues kept the county and the Band from being able to negotiate an agreement to keep this from going to court. In his response, Mr. Boyd blamed the county for the failure to reach a negotiated agreement.

Mille Lacs County did not want this lawsuit. I believe the county did everything it could to avoid it, including an offer to grant broad exceptions from county civil regulatory authority to the Band and Band members and their property in Mille Lacs County. For years Band officials have stated

repeatedly that all they want is jurisdiction over their land and their people. The county's last proposal during negotiations offered just that. It was a proposal no previous county board has ever considered making, and one that if fully considered tells just how far the county was willing to go in order to avoid the lawsuit. In exchange for what was offered in terms of concession, however, the county insisted that a 1855 boundary disclaimer be part of a comprehensive agreement so as to preclude any and all possibility of tribal government jurisdiction over non-members, both now and for the future. The Band was unwilling to concede the old 1855 boundaries. That unwillingness left the county with little choice but to seek a Declaratory Judgment from the appropriate court in order to resolve the issue once and for all, before the federal agencies acting at the Band's request, much to the detriment of the county, recognize the 1855 reservation in such a manner as to effectively preclude the county from successfully mounting a challenge to the assertion the old reservation continues to exist.

The current Mille Lacs County Board of Commissioners chose not to leave this issue festering for future County Commissioners, or other generations to deal with. After a decade of turmoil over fishing rights the citizens of this area deserve peace. The sooner we get resolution to the reservation dispute the better it will be for all citizens, Indian and non-Indian alike.

Sincerely,

Frank Courteau,
Mille Lacs County Commissioner

Paid for by Frank Courteau on his own behalf (10-9-02)

Mille Lacs Messenger/October 9, 2002

APPENDIX Q

Supreme Court's decisions against tribal (Private) sovereignty must be overturned by Congress

Posted: October 11, 2002 - 9:05am EST
by: Tex Hall, John Echohawk and Susan Williams / Guest columnists
by: Kelsey A. Begaye / President / Navajo Nation

Last year, the United States Supreme Court issued two decisions that severely diminished tribal authority to govern Indian country. In *Atkinson Trading Company v. Shirley*, the Supreme Court held that the Navajo Nation hotel occupancy tax could not be applied to a hotel on non-Indian land within the boundaries of the Navajo Nation even though the Navajo Nation tribal government was providing police and fire protection services to the hotel. In *Nevada v. Hicks*, the Supreme Court decided that the Fallon Paiute-Shoshone Tribal Court did not have jurisdiction over a state game warden who came onto Indian land and violated the civil rights of a tribal member and damaged the tribal member's property.

These two decisions essentially mean that, from now on, tribes lack any authority over non-Indians in Indian country, even on tribal lands, unless non-Indians somehow specifically consent to tribal jurisdiction. In response to the governance crisis created in Indian country by these two decisions, tribal leaders met together a year ago, on Sept. 11, and decided they could not face a future where tribes had little or no control over non-Indians in Indian country, even on tribal lands. Tribal leaders formed the Tribal Sovereignty Protection Initiative that has as its principal objective the passage of congressional legislation that would reaffirm inherent tribal governance authority over all people and all places within Indian country.

Open to all tribes, the Tribal Sovereignty Protection Initiative is co-chaired by Tex Hall, President of the National Congress

of American Indians, and Kelsey Begaye, President of the Navajo Nation. Its Legislative Options Committee, open to all tribal attorneys and lobbyists, is co-chaired by John Echohawk, Executive Director of the Native American Rights Fund, and Susan Williams of Williams and Works in Corrales, N.M. After numerous meetings over the past year, the Initiative has completed a Concept Paper on a 2003 Legislative Proposal for a Tribal Governance and Economic Enhancement Act (printed in this issue of Indian Country Today).

During the fall election campaigns, tribal leaders in each state will be meeting with congressional and state candidates and other congressional and state leaders to seek support for and comments on this Concept Paper. The Concept Paper describes the problems faced by tribes as a result of the recent Supreme Court decisions and the need for Congress to address these problems in its constitutional role of making federal Indian policy. At issue is the basic authority of tribal governments in this country: should tribal governments only have authority over Indians in Indian country or should tribal governments have authority over all people and all places within Indian country?

The Concept Paper proposes federal legislation that would reaffirm the inherent authority of tribes to govern all people and all places within Indian country and recognize tribal governments as the primary governments in Indian country. Since the needs and conditions of our 562 tribes differ, tribes should have the option of accepting as much civil jurisdiction and misdemeanor criminal jurisdiction over all people and all places within Indian country as they choose to exercise. One size does not fit all in Indian country, so this legislation should provide flexibility for each tribe to exercise only the jurisdiction that it wants and can manage. Federal funds should be made available to assist tribes to enhance their tribal institutions, like tribal courts, that are exercising the jurisdiction that they opt to take under this legislation.

We know that some non-Indians fear mistreatment by our tribal courts. We believe that these concerns are wrong, but the fact that many tribal court decisions involving non-Indians are now unreviewable in federal courts has caused serious political problems for tribes and has been a major factor in several Supreme Court opinions that have limited tribal sovereignty in recent years. In response, the Concept Paper proposes that those tribes who choose to exercise any of this broad jurisdiction over non-Indians also agree to limited federal court review of their tribal court decisions affecting civil rights and other questions of federal law. Tribal court decisions involving internal tribal matters like tribal elections and tribal enrollment would not be subject to federal court review.

States would still be obligated to provide services to tribal members. We acknowledge, however, that state and local tax revenues would be impacted by tribal governments becoming the primary governments in Indian country under this proposal. In response, the Concept Paper proposes that state and local governments receive federal funding for the services they do provide in Indian country through the existing federal payments in lieu of taxes program which should be extended to cover all lands in Indian country.

We believe that the legislative proposal contained in the Concept Paper of the Tribal Sovereignty Protection Initiative is a fair proposal which provides the clarity in Indian policy from the Congress of the United States that the country needs as we begin the 21st century. We hope that everyone across the country will give serious consideration and support to this Concept Paper.

APPENDIX R

Reservation lawsuit must be disclosed to buyers
by Joel Patenaude, Messenger Staff Writer

The fact that there is a federal lawsuit pending over the boundaries of the Mille Lacs Indian Reservation should be disclosed by real estate agents to potential buyers of land within the disputed 61,000-acre area.

That's the conclusion of Cheryl Costello, senior investigator in the enforcement division of the Minnesota Department of Commerce.

In a March 29 letter to a Mille Lacs area real estate agent, Costello wrote that the lawsuit ought to be mentioned, although it may take years to settle the jurisdictional questions the litigation raises.

"The lawsuit which has been filed would be considered a material fact," Costello wrote to a local real estate agent. "As you are aware, the lawsuit could take many years to be concluded. It would be appropriate to simply advise potential buyers of the pending lawsuit and inform them that obviously you would have no way of knowing the potential outcome or effect(s) of the suit until it is concluded. You would not be considered 'steering' the buyer by disclosing this information."

Required to mention the reservation lawsuit, some real estate agents have said they fear dooming lucrative deals. At the very least, talk of the lawsuit may raise questions in buyers' minds that can't yet be answered.

AGENT MAKES INQUIRY

A local real estate agent wrote to Costello on March 14—three weeks after Mille Lacs County filed its lawsuit arguing that the reservation, as established by treaty in 1855, no longer exists.

That agent, who requested anonymity, wrote that potential buyers are asking "about taxing and permitting power that the (Mille Lacs Band of Ojibwe) would possibly have in an expanded reservation that may affect property the buyers are looking at with us. We obviously have no knowledge of these powers or even if they exist."

Band officials point to several U.S. Supreme Court rulings that prevent them from taxing or otherwise exercising authority over non-band members.

"I guess the agents need to be prudent by notifying those they are doing business with and to protect their licensing," said Mary Al Balber, solicitor general of the Mille Lacs Band. "But these are private transactions and the band has no intention of getting involved or affecting those deals."

Balber said it is "unfortunate" that the reservation lawsuit is considered a material fact requiring disclosure. "There are lawsuits all the time that raise issues about land," she said.

Balber suggested that a better example of a material fact is the possible expansion of Hwy. 169 because it could involve actual takings by the state highway department.

The real estate agent that prompted the conclusion from the commerce department did not say what other information is deemed worthy of disclosure.

But he said he obeys federal law which prevents real estate agents from "steering buyers away from a minority area."

"When the reservation location came up in the past, we always pointed out that it is located on the west shore of Mille Lacs Lake," the agent wrote to Costello.

"Many of our listings are on the west side of the lake and we always show them to buyers without steering them away from the area or making statements about reservation boundaries."

Real estate agents are loathe to discuss what the reservation boundaries might mean, let alone where they are. The very existence of the old reservation is in dispute, as is the jurisdictional significance of the boundaries if they still have meaning to the band and/or non-band landowners.

According to the agent who wrote Costello, fewer potential buyers are satisfied when shown state maps, which identify as reservation the 4,000-odd acres of band-held federal trust land mostly in the Vineland area.

The agent said he would like to know where to send would-be buyers for more information. Having to mention the pending lawsuit only raises more questions.

COUNTY HELP SOUGHT

The agent who wrote to Costello for guidance is now seeking help from the county. But after a couple people backed out of buying property in the disputed area after talking to the county zoning office, the agent said he will refer future clients to the county commissioners who filed the lawsuit.

Commissioner Frank Courteau said he has encouraged people to read the county's lawsuit. He said he is the de facto spokesman on the issue "but I tell people I can't advise them how they should invest their money."

The lawsuit and subsequent news coverage has resulted in more calls from possible buyers, Courteau said.

"There is so much information out there and so much is in dispute," he said.

Courteau said people rightly wonder whether they should buy property in an area that could be legally defined as Indian country—legal status that would come with a determination that the old reservation still exists.

Tribal government should have no authority over non-band members or non-Indian property owners, he said.

"The bottom line is that there are people currently living and doing business in Indian country that are considered and treated differently and left competing with one another for political advantage, as are their governments," Courteau said.

Band officials have tried to assure the county board and residents that it has little, if any, jurisdiction over non-band members.

But Courteau said he's unconvinced, and thus cannot ease inquiring minds. "I can't promise certainty when there is uncertainty," he said.

Balber, the band attorney, said she referred one person to the county who was seeking more information soon after the reservation lawsuit was filed. She said that individual had received a letter from his real estate agent mentioning the lawsuit. But she said she did not hear from that person again.

SIDES ENTRENCHED

State officials have agreed with the county that the 1855 reservation was disestablished by subsequent treaties and the 1889 Nelson Act. However, federal agencies, including the Department of Interior and the Bureau of Indian Affairs, have repeatedly said the 1855 reservation remains undiminished although ownership of lands within it has obviously changed hands.

An attorney for the band has argued that the reservation was indeed ceded and relinquished but only after band members received assurances from federal agents that band members would receive allotments and would not be compelled to move.

Today, as much as 80 percent of the original 61,000-acre reservation—which includes Isle, Wahkon and most of Onamia as well as the townships of Kathio, South Harbor and Isle Harbor—is owned by non-band members.

Several months of closed-door talks last year between county commissioners and band officials failed to result in agreement over jurisdiction.

The band sought authority over band trust and fee lands within the 1855 reservation boundaries. The county commissioners said they would consider that proposal only if the band "disclaims" the continued existence of the 1855 reservation boundaries.

APPENDIX S

Pursuant to Minnesota Statute 2805.1400, Subpart 3.

The following is disclosed to a real estate customer.

1. Under an 1837 Treaty and a U.S. Supreme Court Decision, the Mille Lacs Band of Ojibwe and other Ojibwe Bands were granted certain Hunting, Fishing and Gathering Rights in several counties in Central Minnesota, including a large portion of Mille Lacs Lake. The Mille Lacs Band of Ojibwe has stated that they will manage their take of fish and game to protect the Natural Resources.

2. In late 1999, the Garrison Kathio West Mille Lacs Sanitary Sewer District (GKWML) was formed to work with the Mille Lacs Band of Ojibwe cooperatively to build a community sewage disposal system and treatment facility. The Sewer District was approved by the State of Minnesota, and the U S Government, and a community sewer project is now being constructed which will serve a large portion of West Mille Lacs and other lakes and off lake properties.

3. Mille Lacs County has filed a lawsuit against the Mille Lacs Band of Ojibwe in a dispute over the boundaries of the Mille Lacs Indian Reservation. The Mille Lacs Band has stated publicly that they *would not* have jurisdiction or taxing power over non-band members who own property in this disputed area.

Disclosure received by:

_____

Buyer

_____

Buyer

Date_____

_____

Buyer's Agent

Date_____

APPENDIX T

Minnesota Rules, Table of Chapters

Table of contents for Chapter 2805

2805.1400 DISCLOSURE REQUIREMENTS.

Subpart 1. Advertising. Each licensee shall identify himself or herself as either a broker or an agent in any advertising for the purchase, sale, lease, exchange, mortgaging, transfer, or other disposition of real property, whether the advertising pertains to his or her own property or the property of others.

Subp. 2. Financial interests of licensee. Prior to the negotiation or consummation of any transaction, a licensee shall affirmatively disclose to the owner of real property that the licensee is a real estate broker or agent, and in what capacity the licensee is acting, if the licensee directly, or indirectly through a third party, purchases for himself or herself or acquires, or intends to acquire, any interest in, or any option to purchase, the owner's property.

Subp. 3. Material facts. Licensees shall disclose to any prospective purchaser all material facts pertaining to the property, of which the licensee is aware, which could adversely and significantly affect an ordinary purchaser's use or enjoyment of the property, or any intended use of the property of which the licensee is aware.

Subp. 4. Nonperformance of any party. If a licensee is put on notice by any party to a real estate transaction that the party will not perform in accordance with the terms of a purchase agreement or other similar written agreement to convey real estate, the licensee shall immediately disclose the fact of that party's intent not to perform to the other party or parties to the transaction. Whenever reasonably possible, the licensee shall inform the party who will not perform of the licensee's obligation to disclose this fact to

the other party or parties to the transaction prior to making the disclosure. The obligation required by this part shall not apply to notice of a party's inability to keep or fulfill any contingency to which the real estate transaction has been made subject.

STAT AUTH: MS s 45.023; 61A.03; 82.28

HIST: 11 SR 394

Current as of 05/12/97

APPENDIX U

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Civil No. CV 02-407 JMR/RLE

COUNTY OF MILLE LACS,
Plaintiff,

vs

MELANIE BENJAMIN, *et al.*,
Defendants.

DEFENDANTS' ANSWER, AFFIRMATIVE DEFENSES AND REQUEST FOR RELIEF IN RESPONSE TO COMPLAINT OF INTERVENOR FIRST NATIONAL BANK OF MILACA

A. ANSWER.

Melanie Benjamin, individually and officially as Chief Executive, Mille Lacs Band of Ojibwe, Herb Weyaus, individually and officially as Secretary/Treasurer, Mille Lacs Band of Ojibwe, Sandra Blake, individually and officially as District Representative, Mille Lacs Band of Ojibwe, Marvin Bruneau, individually and officially as District Representative, Mille Lacs Band of Ojibwe, and Harry Davis, individually and officially as District Representative, Mille Lacs Band of Ojibwe (collectively, "defendants") answer the allegations in the Complaint of Intervenor First National Bank of Milaca ("Bank") as follows (all & references are tot he paragraphs in the Bank's complaint):

1. Defendants admit the allegations in ¶ 1.

2. Defendants are without knowledge or information sufficient to form a belief as the truth of the allegations in ¶ 2.

3. Defendants admit that the Bank operates of branch is Isle. Defendants are without knowledge or information sufficient to form a belief as the truth of all other allegations in ¶ 3.

4. Defendants admit that the reservation established for the Mille Lacs Band ("Band") in the 1855 Treaty with the Chippewa, 10 Stat. 1165 ("1855 Reservation"), included the townships known as Kathio, South Harbor and Isle Harbor. Defendants deny that these townships are no longer included within the 1855 Reservation. Defendants are without knowledge or information sufficient to form a belief as the truth of all other allegations in ¶ 4.

5. Defendants deny the allegations in ¶ 5.

6. Defendants deny the allegations in ¶ 6.

7. In response to the allegations in ¶ 7, defendants admit that the Band has asserted that the 1855 Reservation continues to exist, but deny that it has only made this assertion in recent years.

8. In response to the allegations in ¶ 8, Defendants admit that an employee of the Band's Corporate Commission wrote a letter in 1992 to businesses that did, or had expressed the intention to do, business with the Band, in an effort to secure compliance with provisions of Federal law, and that another employee has written a similar letter more recently. Defendants allege that the letters speak for themselves and are the best evidence of their contents. Defendants deny all other allegations in ¶ 8.

9. In response to the first sentence in ¶ 9, defendants allege that the provisions of Title 18, § 103, of the Mille Lacs Band Statutes Annotated speak for themselves and are the best evidence of their contents. Defendants deny the allegations in the second sentence in ¶ 9.

10. In response to the first sentence in ¶ 10, defendants allege that the provisions of the Band legislation speak for themselves and are the best evidence of their contents. Defendants deny the allegations in the second and third sentences of ¶ 10.

11. Defendants admit that the United States holds title to lands in trust for the Band within the 1855 Reservation, and that the Band holds title to lands in fee within the 1855 Reservation. Defendants deny all other allegations in ¶ 11.

12. Defendants admit the allegations in the first sentence in ¶ 12. In response to the second sentence in ¶ 12, defendants allege that the provisions of 25 C.F.R. Part 151 speak for themselves and are the best evidence of their contents. Defendants deny the allegations in the third sentence in ¶ 12.

13. Defendants deny the allegations in the first sentence in ¶ 13. Defendants are without knowledge or information sufficient to form a belief as the truth of the allegations in the second sentence in ¶ 13.

14. In response to the allegations in ¶ 14, defendants admit that the Band has asserted that County land use regulations are not applicable to the Band's land use activities on trust lands and fee lands within the 1855 Reservation, but allege that the Band has complied under protest with all County land use regulations on fee lands within the 1855 Reservation. Defendants deny all other allegations in ¶ 14.

15. Defendants deny the allegations in ¶ 15 that the 1855 Reservation has been disestablished. The remainder of ¶ 15 contains an assertion of law to which no response is required.

16. Defendants deny the allegations in ¶ 16.

17. Paragraph 17 contains assertions of law to which no response is required.

18. Defendants are without knowledge or information sufficient to form a belief as the truth of the allegations in ¶ 18.

19. Defendants are without knowledge or information sufficient to form a belief as the truth of the allegations in ¶ 19.

20. In response to ¶ 20 defendants incorporated by reference their responses to ¶¶ 1-19.

21. Defendants deny the allegations in ¶ 21.

22. Defendants deny the allegations in ¶ 22.

23. Defendants deny the allegations in ¶ 23.

24. Defendants deny the allegations in ¶ 24.

25. Defendants deny the allegations in ¶ 25.

B. AFFIRMATIVE DEFENSES.

Defendants assert the following affirmative defenses:

1. The complaint fails to state a claim upon which relief can be granted.

2. The complaint does not present a justiciable case or controversy within the subject matter jurisdiction of the Court.

3. The Bank lacks standing to assert the claims set forth in the complaint.

4. The claims set forth in the complaint are not ripe.

5. The Bank has failed to exhaust administrative and other remedies.

6. Some of the claims set forth in the complaint are not moot.

7. The Bank failed to join indispensable parties.

8. Defendants are immune from suit under the doctrine of tribal sovereign immunity.

C. REQUEST FOR RELIEF.

Defendants request that the Court provide the following relief:

1. Dismiss the Bank's claim for relief;

2. Award defendants their costs and disbursements herein; and

3. Other just relief.

Dated: July 15, 2002

MILLE LACS BAND OF OJIBWE

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Nos. 04-228 & 04-229

IN THE

Supreme Court of the United States

FIRST NATIONAL BANK OF MILACA,

Petitioner,

-and-

COUNTY OF MILLE LACS,

Petitioner,

v.

MELANIE BENJAMIN, *et al.*,

Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION

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Petitioners County of Mille Lacs ("County") and First National Bank of Milaca ("Bank") sued respondents, five officials of the Mille Lacs Band of Ojibwe Indians ("Band"), for a declaration that the Mille Lacs Indian Reservation has been disestablished. After discovery, respondents moved for summary judgment on jurisdictional grounds. The district court, in a detailed opinion, held petitioners lacked standing and the case was not ripe. Bank App. 9a-27a (Rosenbaum, C.J.). On *de novo* review, a unanimous Eighth Circuit panel held "the district court correctly concluded [petitioners] lacked standing" and ordered the case dismissed without prejudice. *Id.* 4a, 5a, 7a (Riley, Bowman, and Smith, JJ).

In reaching these conclusions, the district court and court of appeals applied well-settled principles governing Article III standing. *Petitioners do not challenge (or even discuss) these principles*. Instead, they point to cases in which courts have resolved reservation disestablishment claims on the merits. However, the fact that courts have resolved such claims in other cases does not demonstrate petitioners had standing in this case. Federal courts have had no difficulty in applying the standing requirement in reservation disestablishment cases, and the lower courts' determination that petitioners lacked standing in this case conflicts with no decision of this or any other court. Because the consistent, straightforward application of settled principles of standing in reservation disestablishment cases does not present an important federal question requiring this Court's intervention, the dismissal of this case without prejudice does not warrant *certiorari*.

STATEMENT OF THE CASE

1.

In the early 1980s, the Mille Lacs Band formed a separation-of-powers government, and began adopting written statutes regulating its affairs. *See* Resp. 8th Cir. App. 170. Most of these statutes were adopted in the mid-1980s, nearly 20 years ago, and were re-codified and published in 1995. *Id.* 168, 170, 213-14.

The Band's statutes do not assert jurisdiction over all persons within the boundaries of the Mille Lacs Indian Reservation, as established in 1855. Rather, they typically apply to persons and on lands or territories "under the jurisdiction" of the Band. *See, e.g.*, 2 MLBSA §§ 3001(a), 3003 (exclusion ordinance) (Bank 8th Cir. App. 93-94); 5 MLBSA §§ 101, 111(b), 113 (Band court jurisdiction) (Bank 8th Cir. App. 107-12); 11 MLBSA § 1002 (solid waste regulation) (Bank 8th Cir. App. 242); 18 MLBSA § 101 (business licensing) (Bank 8th Cir. App. 67); 24 MLBSA § 1 (civil causes of action) (Bank 8th Cir. App. 117); 24 MLBSA §§ 3301, 3309 (creditor remedies) (Bank 8th Cir. App. 181-84). This approach is common in Indian country, where the personal and territorial scope of tribal jurisdiction can vary depending on who (tribal members, nonmember Indians, or other nonmembers) is being regulated and the purpose of the regulation, and can vary over time depending on judicial decisions, the acquisition of trust lands, and other factors.

In 1978, this Court held tribes lack criminal jurisdiction over nonmembers. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978). Since then, the Court has held tribes generally lack *civil* jurisdiction over nonmembers as well:

"Where nonmembers are concerned, the 'exercise of tribal power *beyond what is necessary to protect tribal self-government or to control internal relations* is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation.'" *Nevada v. Hicks*, 533 U.S. 353, 359 (2001), quoting *Montana v. United States*, 450 U.S. 544, 564 (1981) (emphasis added by the *Hicks* Court).

Thus, when it comes to nonmembers, a tribe's "territorial jurisdiction" is not co-extensive with its reservation boundaries. For example, in *Atkinson Trading Co. v. Shirley*, 532 U.S. 645 (2001), the Court held a tribe could not tax a nonmember doing business on non-Indian fee land within a reservation. The Court stated an "Indian tribe's sovereign power to tax – whatever its derivation – reaches no further than *tribal* land." *Id.* at 653 (emphasis added). Indeed, the *Hicks* Court observed that "[h]itherto, the absence of tribal [land] ownership has been virtually conclusive of the absence of tribal civil jurisdiction; with one minor exception, we have never upheld under *Montana* the extension of tribal civil authority over nonmembers on non-Indian land." 533 U.S. at 360.

For these reasons, the Band's statutes cannot fairly be read as asserting jurisdiction over nonmembers throughout the 1855 Reservation. The Band's current Chief Executive, Melanie Benjamin, interprets references in the Band's statutes to the "territorial jurisdiction" of the Band and to "property subject to the jurisdiction of the Band" as references to *Band-owned* lands. Resp. 8th Cir. App. 181c-d. In light of this Court's decisions, Ms. Benjamin believes the Band's statutes "pertain to the members of the Mille Lacs Band Reservation. The enrolled members. And how we govern ourselves. So, with that, the answer [is] that those laws are directed towards the members of the Mille Lacs Band." *Id.* 179.

2.

Although they have been on the books for nearly 20 years, the Band has *never* applied or threatened to apply its laws to the County or the Bank. The Band only applies its laws to nonmembers who choose to do business with the Band on Band lands. This assertion of jurisdiction does *not* rest on the status of the 1855 Reservation.

For example, within the Band's separation-of-powers government, its Corporate Commission has "the sole power and authority to license commercial entities who sell or offer for sale any goods and/or services to person(s) on lands subject to the jurisdiction of the [Band]." 18 MLBSA § 101 (Bank 8th Cir. App. 67). A person or entity who desires to sell goods or services to the Band, a Band member or "any person subject to the jurisdiction of the [Band] . . . shall . . . be permitted to do so under such rules and regulations as the Corporate Commission may prescribe." *Id.*

Under these provisions, the Band's Corporate Commission developed a business-licensing program in the early 1990s, coincident with the development of the Band's casino gaming enterprises. Resp. 8th Cir. App. 127 (¶ 4). The licensing program was designed to collect background information on persons doing business with the Band, to enable the Band to protect the reputation and viability of its casinos. *Id.* The Commission's requirement that businesses obtain a Band license was *not* based on a business's location within the 1855 reservation; the requirement was applied only to businesses that chose to provide goods or services to the Band on Band lands. *Id.* (¶¶ 3-4).

The Bank focuses on, but mischaracterizes, two letters regarding the Band's licensing program. Bank Pet. at 9. In a March 23, 1992, letter, the Band's Corporate Administrator wrote that the Corporate Commission was "in the process of licensing all organizations doing business upon *tribal* lands." Bank App. 60a (emphasis added). The letter quotes the preamble to the Band's licensing statute, in which the Band's legislative body found that licensing persons and entities "who engage in the sale of any goods and/or services with *any constituent band* of the Non-Removable Mille Lacs Band of Ojibwe Indians is an effective way to regulate commercial activity on lands under the jurisdiction of the band." *Id.* (emphasis added). The letter was sent only to those persons and entities that had business dealings with the Band, Resp. 8th Cir. App. 127 (¶ 3), and, as the Bank admitted, was not sent to the Bank. *Id.* 124 (¶ b).

In a 2001 letter, the Corporate Commission's current Business Regulation Officer, Molly Big Bear, wrote that it is the Band's goal "to establish an effective system of regulation concerning business transactions within the boundaries of tribal territories." Bank App. 62a. The letter states the Commission is "in the process of updating all licenses of organizations doing business upon *tribal lands*," and encloses a "Temporary Vendor License application *to do business with the Mille Lacs Band* of Chippewa Indians." *Id.* 62a-63a (emphasis added). Like the 1992 letter, Ms. Big Bear's letter was "sent *only* to those business entities – whether located on or off [the] Reservation – that have expressed an intent to do business with the Band." Resp. 8th Cir. App. 32 (¶ 5). The Bank admitted it did not receive this letter either. *Id.* 124(¶ b).

Ms. Big Bear testified in a deposition that her understanding of the phrase "within the boundaries of tribal territories" refers to the "1855 boundaries," and that, under 18 MLBSA § 101 the Band's Corporate Commission "has the *power* to license anyone who wishes to provide goods or services to any member of the Mille Lacs Band." Resp. 8th Cir. App. 185, 190 (emphasis added). Ms. Big Bear also testified, however, that the Corporate Commission has never exercised this alleged power, but instead has sought only to license those businesses that are doing business with the Band. *Id.* 32-33 (¶¶ 4-9), 186, 188, 191-95. There is no evidence the Band has *ever* sent a license application to a business that was not seeking to do business with the Band, that is has *ever* told such a business that it was required to obtain a license from the Band, or that it has *ever* taken *any* action against such a business because it did not obtain a license from the Band.

3.

Soon after this Court affirmed the Band's treaty hunting, fishing and gathering rights in *Minnesota v. Mille Lacs Band*, 526 U.S. 172 (1999), the Band's opponents began claiming the Band was threatening to regulate non-Indians on non-Indian lands within the 1855 Reservation. In January 2000, then-Mille Lacs County Attorney Janelle Kendall found "widespread *misinformation*" about the Band's ability to tax, prosecute and zone non-Indians was creating civic unrest and a public safety risk. Resp. 8th Cir. App. 69, 73 (emphasis added). Concerned that County residents were being "intimidated or pressured . . . to participate in political activity currently underway regarding these issues," Ms. Kendall undertook to advise the County Board "regarding the general legal ability of the Mille Lacs Band to affect the daily living situation of non-Indian County residents." *Id.* 69.

Ms. Kendall found the Band had *not* sought to tax or regulate any businesses other than those that chose to do business with the Band. *Id.* at 70. Further, she stated that, other than regulation of underground injection wells, she was "unaware of the Mille Lacs Band ever attempting to exercise any other civil or regulatory jurisdiction, including attempted taxation, regarding *any non-Indian* in Mille Lacs County." *Id.* at 70-71 (emphasis in original).[1] Based on her analysis of the Band's legal authority, Ms. Kendall concluded that, even if the Reservation continued to exist, the Band could not tax, zone or prosecute non-Indians within its boundaries. *Id.* 71-72.

Ms. Kendall's memorandum notwithstanding, the County retained outside counsel and filed suit against five Band officials in 2002, seeking a declaration that the original boundaries of the Mille Lacs Reservation have been disestablished. County 8th Cir. App. 44. The Bank intervened seeking the same relief. Resp. 8th Cir. App. 24. Neither disputed the "reservation" or "Indian country" status of trust lands within the original Reservation boundaries. Bank App. 11a.[2]

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1. Although the Environmental Protection Agency ("EPA") had approved the Band's application to develop a program regulating underground injection wells on the Reservation, the Band never adopted the program. Instead, it negotiated with EPA and the Minnesota Pollution Control Agency ("MPCA") for continued *Federal* regulation of such wells, with technical assistance from the Band and MPCA. Resp. 8th Cir. App. 151 (¶ 25). The Band has applied for "treatment-as-a-state" status under other environmental programs so that it can receive research and development funding from EPA, but has not sought to implement any other regulatory program. *Id.* 198-201.

2. *After* this lawsuit was filed, local real estate agents began disclosing that *the County* had filed a lawsuit "in a dispute over the boundaries" of the Reservation, while noting that the "Band has stated publicly that [it] *would not* have jurisdiction or taxing power over non-band members who own property in the disputed area." County App. 206a (emphasis in original).

After completion of initial discovery, respondents moved for summary judgment on standing, ripeness, sovereign immunity and indispensable party grounds. The district court dismissed the case, finding petitioners lacked standing and the case was not ripe. Petitioners' primary claim of injury arose out of threatened regulation by Band ordinances. Bank App. 16a. The court found this claimed injury was not "actual, concrete, or imminent," since the Band had "neither threatened nor demonstrated an intent to enforce its ordinances beyond its 4000 acres [of trust lands]." *Id.* 16a-17a. Nor did the text of the Band ordinances cited by petitioners establish threatened or pending enforcement, since they contained only one reference to the 1855 Reservation and asserted jurisdiction only to the extent authorized by Federal law. *Id.* 18a & n.8.

The court likewise rejected the County's claim that its ability to protect public safety had been harmed. The County Sheriff's deposition testimony indicated the Band had taken no actions that adversely affected the County's ability to enforce state or county law, and the Band and its members had consistently complied with County zoning regulations and state traffic laws. *Id.* 19a. The court rejected the proposition that Band compliance "under protest" injured the County, as no legal precept supported the theory that "*compliance* with County law constitutes injury." *Id.* 20a (emphasis in original).

The County also alleged injury on the grounds that it might be subject to liability in a future lawsuit challenging its enforcement of civil regulatory laws against Band members on the Reservation. Because no such lawsuit has been filed (or threatened), the court found this "amorphous threat of future liability" insufficient to establish injury in fact. *Id.* 20a-21a.

Finally, the court rejected petitioners' arguments that the reservation boundary dispute had adversely affected the value of the real property interests within the reservation and that such an effect could fairly be attributed to the challenged conduct of respondents. *Id.* 21a-22a.

A unanimous panel of the Eighth Circuit Court of Appeals affirmed. Bank App. 2a. The court reviewed the district court's decision *de novo*, *id.* 4a, and found it had "correctly concluded that [petitioners] lacked standing." *Id.* 5a. The Bank's concerns regarding potential Band regulation did not establish injury in fact but at best "reflect speculative harms based upon the assumed future intent of the Band." *Id.* 6a. For its part, the County was "unable to point to any definite controversy that exists from the Band's purported expansion of tribal jurisdiction over the disputed portion of the reservation," and "presented no evidence that its ability to enforce state or local law on the reservation has been usurped or even affected by the Band's alleged intentions." *Id.*

The court reversed the district court in one respect: it held that the dismissal of the case should be without prejudice. *Id.* 6a-7a. The court subsequently denied petitions for panel and *en banc* rehearing. *Id.* 28a.

REASONS FOR DENYING THE PETITIONS

Petitioners do not challenge (and do not even discuss) the principles of standing applied by the district court and the court of appeals in this case. The sole issue presented is whether the lower courts properly applied these correctly stated legal principles to the particular facts of the case. This factually intensive issue does not warrant *certiorari* for three reasons.

First, petitioners fail to show that the lower courts' application of Article III's standing requirement in this case conflicts with any decision of this or any other court. Petitioners' observation that reservation disestablishment claims have been decided on the merits in other cases does not demonstrate any such conflict, since the resolution of a particular issue in one case does not demonstrate the issue is justiciable in another case.

Second, petitioners fail to show that the federal courts have had any difficulty applying Article III's standing requirement in reservation disestablishment cases. The lower federal courts' consistent application of the standing requirement in such cases does not present an important federal question warranting this Court's review.

Third, petitioners' claim that the lower courts misapplied the standing requirement in this case lacks merit. The lower courts' determination that petitioners failed, in response to respondents' summary judgment motion, to produce specific evidence of injury, is supported by the record and provides no basis for *certiorari*.

A. The Lower Courts' Decisions In This Case Do Not Conflict with Any Decision of This Court or Any Other Court.

Article III limits the "judicial power" of the United States to the resolution of "cases" and "controversies." *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 471 (1982). The core component of standing is "an essential and unchanging part" of the case-or-controversy requirement. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). To establish standing, a party must establish:

> (1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Friends of the Earth v. Laidlaw Environmental Services, 528 U.S. 167, 180-81 (2000); *Lujan*, 504 U.S. at 560-61.

The elements of standing are "an indispensable part of the plaintiff's case," and "must be supported in the same way as any other matter on which the plaintiff has the burden of proof, *i.e.* with the manner and degree of evidence required at the successive stages of the litigation." *Lujan*, 504 U.S. at 561. In responding to a summary judgment motion, a plaintiff must set forth by affidavit or other evidence "specific facts" that demonstrate its standing. *Id.*

The mere existence of a statute that might someday be applied to a plaintiff is insufficient to confer standing. *E.g. Lake Carriers' Ass'n v. MacMullan*, 406 U.S. 498, 507 (1972) ("justiciable controversy does not exist where 'compliance with [challenged] statutes is uncoerced by risk of their enforcement'"); *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1139 (9th Cir. 2000) (*en banc*) (neither mere existence of statute nor generalized threat of prosecution creates Article III case or controversy), *cert. denied*, 531 U.S. 1143 (2001). Instead, a plaintiff must present "specific facts" showing a "realistic danger" that defendants will enforce their laws in a way that "directly injur[es]" the plaintiff. *Pennell v. San Jose*, 485 U.S. 1, 8 (1988); *Babbitt v. United Farm Workers*, 442 U.S. 289, 298 (1979).

Petitioners do not challenge, or even discuss, these principles. Instead, they argue the dismissal of this case conflicts with other cases in which reservation disestablishment claims were decided on the merits. However, the fact that a particular issue is justiciable in one case does not mean it is justiciable in every case in which it is raised. For example, the constitutionality of the Line Item Veto Act was justiciable in *Clinton v. City of New York*, 524 U.S. 417, 436 (1998), but not in *Raines v. Byrd*, 521 U.S. 811, 830 (1997), where plaintiffs did not establish a sufficiently concrete injury to demonstrate standing. Similarly, a challenge to a federal arbitration scheme was justiciable in *Thomas v. Union Carbide*, 473 U.S. 568, 579-81 (1985), but not in *Ruckelshaus v. Monsanto*, 467 U.S. 986, 1019-20 (1984), where the plaintiff did not allege it had been compelled to resort to arbitration.

The principal case on which petitioners rely here, *Rosebud Sioux Tribe v. Kneip*, 375 F. Supp. 1065 (D.S.D.

1974), *aff'd*, 521 F.2d 87 (8th Cir. 1975), *aff'd*, 430 U.S. 584 (1977), does not conflict at all with the decisions in this case. In that case a tribe sued to establish the continued existence of its reservation. The tribe alleged specific, concrete injury because state and county officials were "*exercising* both civil and criminal jurisdiction over [tribal] members." 375 F. Supp. at 1066 (emphasis added). As the district court explained in this case, *Rosebud* "involved explicit efforts by one sovereign to exercise particular powers beyond [its] lawful jurisdiction; [it] did not present abstracted concerns over reservation boundaries." Bank App. 25a-26a.

Similarly, in *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 340-41 (1998), a tribe brought suit after a state agency issued a permit for a landfill within the historic boundaries of its reservation. The Bank (Pet. at 18) notes that the tribe did not pursue its request for an *injunction* on appeal, but this does not detract from the fact that specific state action – the issuance of the permit – had injured the tribe and gave it standing to sue.[3]

The only other reservation disestablishment case petitioners cite is *City of New Town v. United States*, 454 F.2d 121 (8th Cir. 1972). In that case a city alleged three specific injuries from a purported expansion of federal and tribal jurisdiction over a disputed portion of a reservation: (1) loss of jurisdiction over Indians within city limits; (2) loss of "revenue derived from licensing the sale of alcoholic beverages"; and (3) impairment of contractual

3. The Bank also cites *Oneida Indian Nation v. City of Sherrill*, 337 F.3d 139 (2nd Cir. 2003), *cert. granted*, 124 S. Ct. 2904 (2004). In that case, a tribe sued after a city imposed property taxes on tribal properties, purchased the properties at tax sales, recorded deeds, and started formal eviction proceedings. 337 F.3d at 144.

obligations relating to bonds and warrants backed by property tax revenues. County 8th Cir. App. 135-36. The record does not indicate that defendants disputed these allegations, and the court did not address standing or justiciability. In *Cass County v. United States*, 570 F.2d 737, 741 n.4 (8th Cir. 1978), the Eighth Circuit held *New Town* did not support an argument that a case or controversy existed because "[j]usticiability was never considered as an issue."

New Town provides no basis for a grant of *certiorari* in this case. First, because *New Town* was an Eighth Circuit case, it does not present a conflict between the circuits.[4] Second, because the plaintiff made specific, *undisputed* allegations of injury, the *New Town* court did not reach the issue presented in this case: whether petitioners substantiated their claims of injury when those claims were challenged in respondents' motion for summary judgment. Since the *New Town* court did not address this issue, there is no conflict. Third, because *New Town* does not discuss Article III standing, it does not set an affirmative precedent that standing exists in similar cases. *See Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 119 (1984).

Petitioners cite several other cases in which courts adjudicated challenges to particular tribal laws. The principal cases on which they rely are also Eighth Circuit cases, and thus do not establish the existence of a conflict between circuits. Moreover, because the plaintiff established specific injury from the particular tribal law being challenged in each case, there is no conflict with the holding in this case.

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4. In denying panel and *en banc* rehearing in this case, the Eighth Circuit necessarily determined that *New Town* did not present an *intra-circuit* conflict warranting further consideration.

In *Baker Elec. Co. v. Chaske*, 28 F.3d 1466, 1469 (8th Cir. 1994), a tribe contracted with a power producer to serve tribal facilities. When a state court upheld a competing producer's right to serve the facilities, the tribe enacted a utilities code to perpetuate its exclusive relationship with its preferred producer. *Id.* at 1470. The tribe enacted the code as part of a specific, longstanding effort to regulate the provision of electricity services to the competing producer's financial detriment. *Id.* at 1469-70. Thus, the competing producer was already suffering economic injury from the tribe's actions, and the tribe did not dispute its standing to challenge the code.

In *Northern States Power v. Prairie Island Mdewakaton Sioux Indian Community*, 781 F. Supp. 612, 613 (D. Minn. 1991), *aff'd*, 991 F.2d 458 (8th Cir. 1993), a tribe enacted an ordinance restricting plaintiff's nuclear waste shipments. After plaintiff challenged the ordinance administratively, the tribe formally resolved to enforce it. *Id.* at 614. The plaintiff delayed shipments of water samples because of the ordinance, risking fines and other adverse consequences. *Id.* at 616. The district court issued an injunction, finding plaintiff would be *irreparably harmed* if the ordinance remained in effect. *Id.* at 616-17. Because plaintiff showed irreparable harm, there was no question it had standing.

The two non-Eighth Circuit cases on which petitioners rely also do not conflict with the lower courts' decisions in this case. In *Wisconsin v. Baker*, 464 F. Supp. 1377, *aff'd*, 698 F.2d 1323 (7th Cir.), *cert. denied*, 463 U.S. 1207 (1983), a state challenged the application of a tribal hunting and fishing code to nonmembers. To establish its standing, the state alleged, and the defendant tribal officials did not dispute, that "upon defendants' direction, agents of the defendants

are *enforcing* the tribal conservation code, causing real and substantial injury to the plaintiff and those for whom it serves as trustee." 464 F. Supp. at 1380 (emphasis added). Similarly, in *Tenneco Oil Co. v. Sac & Fox Tribe of Indians of Okl.*, 725 F.2d 572, 574 (10th Cir. 1984), an oil and gas lessee challenged tribal ordinances purporting to regulate oil and gas leases. The lessee sued after the tribe *commenced enforcement proceedings* to cancel its lease under the ordinances. *Id.* No similar proceedings have been commenced – or threatened – in this case.

Finally, petitioners cite the Eighth Circuit's decision in *Mille Lacs Band of Chippewa Indians v. Minnesota*, 989 F.2d 994 (8th Cir. 1993), a case in which the Band had filed to suit to enable its members to exercise usufructuary rights on ceded lands. The Eighth Circuit permitted counties and landowners to intervene under Federal Rule of Civil Procedure 24(a) because their interests "might be impaired by the disposition" of the case. *Id.* at 997. The court reasoned that the litigation would determine the rights of Band members to hunt, fish and gather on the ceded lands, "including land the counties and landowners own," and *might* reduce the proposed intervenors' property values. *Id.* at 998. As the Eighth Circuit later observed, the court did not address Article III standing. *See Mausolf v. Babbitt*, 85 F.3d 1295, 1299 & n.6 (8th Cir. 1996).

This case is different. Respondents are not suing for a declaration that the 1855 Reservation still exists, or that the Band has any rights or jurisdiction on petitioners' lands. Under Article III, the issue is not whether petitioners' interests "might be impaired" by the disposition of their own lawsuit, but whether the challenged actions of the defendants have caused an actual or imminent injury. On respondents' motion

for summary judgment it was not enough for petitioners to allege a possible injury; they had the burden to produce specific facts to substantiate the existence of a real injury caused by respondents. The lower courts' determination that they failed to meet this burden is not at all inconsistent with the Eighth Circuit's intervention decision in *Mille Lacs*.[5]

B. Federal Courts Have Had No Difficulty in Applying Article III Standing Requirements in Reservation Disestablishment Cases.

Because the petitions do not challenge the settled principles of standing on which the district court and court of appeals relied, they present, at most, a challenge to the application of those principles to the particular facts of this case. Petitioners make no showing, however, that this fact-bound issue warrants *certiorari*. There is no indication the lower federal courts have had difficulty applying the doctrine of standing to reservation disestablishment cases.

Reservation disestablishment claims have been adjudicated on the merits in cases in which the plaintiff established a concrete injury arising from the exercise of particular governmental authority premised on the existence or disestablishment of a reservation. In addition to *Rosebud*, *Yankton Sioux*, and *New Town*, *supra*, *see*, *Hagen v. Utah*, 510 U.S. 399 (1994) (state criminal prosecution); *Solem v. Bartlett*, 465 U.S. 463 (1984) (state criminal prosecution); *DeCoteau v. District Court*, 420 U.S. 425 (1975) (state child placement proceeding and state criminal prosecution); *Mattz v. Arnett*, 412 U.S. 481 (1973) (state seizure and forfeiture

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5. Judge Bowman wrote the *Mille Lacs* intervention decision and was on the Eighth Circuit panel in this case.

of fishing equipment); *Seymour v. Superintendent*, 368 U.S. 351 (1962) (state criminal prosecution); *United States v. Webb*, 219 F.3d 1127 (9th Cir. 2000), *cert. denied*, 531 U.S. 1200 (2001) (federal criminal prosecution); *United States v. Grey Bear*, 828 F.2d 1286 (8th Cir.), *vacated in other respects*, 836 F.2d 1088 (8th Cir. 1987) (*en banc*) (federal criminal prosecution); *White Earth Band of Chippewa Indians v. Alexander*, 518 F. Supp. 527 (D. Minn. 1981), *aff'd*, 683 F.2d 1129 (8th Cir.), *cert. denied*, 459 U.S. 1070 (1982) (state enforcement of hunting and fishing laws); *United States v. Minnesota*, 466 F. Supp. 1382 (D. Minn. 1979), *aff'd sub nom. Red Lake Band of Chippewa Indians v. Minnesota*, 614 F.2d 1161 (8th Cir.), *cert. denied*, 449 U.S. 905 (1980) (state enforcement of hunting and fishing laws).

In contrast, the federal courts have held reservation disestablishment claims nonjusticiable where the plaintiff did not establish an actual or imminent injury from any particular governmental action. *See, e.g., Association of Property Owners/ Residents of Port Madison v. Individual Council Members of the Suquamish Tribal Council*, 79 Fed. Appx. 126, 2003 WL 22098043 (9th Cir. 2003) (unpublished) (general "threat of enforcement of Tribal laws or exercise of Tribal jurisdiction" insufficient to establish standing); *Cass County*, 570 F.2d at 741 (claim nonjusticiable where jurisdictional question presented in the district court "abstract and hypothetical"); *Brown-Outagamie-Oneida Jurisdiction Commission v. Powless*, No. 85-C-1052 (E.D. Wis. 1990) (Bank 8th Cir. App. 55-56) (claim nonjusticiable because plaintiffs "unable to point to any actual exercise of jurisdiction over fee patented lands by the tribe").

Petitioners do not suggest these courts have incorrectly applied standing principles in reservation disestablishment cases.

The consistent application of settled principles of standing in reservation disestablishment cases does not warrant *certiorari*.

C. The Lower Courts Did Not Err in Determining Petitioners Failed to Present Specific Evidence of Injury in Response to Respondents' Summary Judgment Motion.

Even if this Court were inclined to review the application of correctly stated standing principles to particular facts, there is nothing in the record to suggest the lower courts erred in applying those principles to the facts in this case.

1. Enforcement of State and Local Laws.

The County asserts an injury to its ability to enforce its laws. However, it failed to substantiate this claim with any specific examples where County law enforcement was affected by respondents' actions. When asked to provide such details, the County responded that its allegation was "not based upon any specific date, person, activity, event or location." Resp. 8th Cir. App. 80-81. The County Sheriff testified respondents have taken no actions that impaired public safety or his agency's ability to enforce state and local laws. *Id.* 102, 105-06, 108-11, 113, 118, 121. And, the County admitted it presently enforces the law "*without* regard to the 1855 Reservation boundaries or membership in the Mille Lacs Band." County 8th Cir. Br. at 47 (emphasis in original). The lower courts correctly concluded the County did not demonstrate an actual or imminent injury to its ability to enforce its laws.[6]

6. In *Virginia v. Hicks*, 539 U.S. 113, 120-21 (2003), this Court held a state suffered injury in fact from a state court judgment holding a state law unconstitutional, and therefore had standing to challenge the state court judgment in this Court. There is no similar judgment limiting County law enforcement in this case.

2. Enforcement of Band Laws.

The Bank claims injury from the *potential* application of Band laws to it. Although most Band laws were enacted nearly 20 years ago, Resp. 8th Cir. App. 168, 170, 213-14, *no* Band law has *ever* been applied to the Bank. For example, the business-licensing program developed under Band law applies only to businesses that do business with the Band. *Id.* 32-33 (¶¶ 4-9), 124 (¶ b), 127 (¶¶ 3-4), 186, 188, 191-95. Similarly, the Band has limited enforcement of its environmental laws to its own lands and members. *Id.* 151 (¶¶ 24-25), 198-201. As the district court found, "the Band has neither threatened nor demonstrated an intention to enforce its ordinances beyond its 4000 acres." Bank App. 17a.

The Bank submitted no evidence the Band intends, after 20 years, to begin applying its laws to the Bank. The Bank (Pet. at 8) quotes a passage from a 15-year-old political speech by a former Band Chief Executive, but the speech presented a program to re-purchase lands, not to assert jurisdiction over nonmembers. The Bank cites no evidence of any *current* Band intent to expand the enforcement of Band laws to nonmembers. And, despite the Bank's claim (Pet. at 11) that "the specter of Band regulation poses significant operational concerns to the Bank," the Bank submitted no evidence that the Band's statutes have had *any* impact on Bank operations. Specifically, the Bank made no claim that either the existence of the Band's statutes or the Band's position regarding the status of the 1855 Reservation has affected in any way who the Bank does business with, where it does business, the terms of any Bank loan or other transaction, the Bank's enforcement of any delinquent loan, the Bank's future business plans, or any other matter.

3. Property Values.

The Bank claims (Pet. at 13) the Band's alleged assertion of regulatory authority has caused a decline in property values. The most basic problem with this claim was the "utter paucity of admissible evidence" to support it. Bank App. 22a. The Bank's *only* evidence of diminished values was a two-and-a-half page affidavit from an appraiser, Roger Wagner. Bank 8th Cir. App. 427-30. The district court found this affidavit did not satisfy plaintiffs' burden under Federal Rule of Civil Procedure 56(e) to adduce specific facts establishing a genuine issue for trial. Bank App. 21a.[7]

The only "fact" underlying the opinion was a published advertisement identifying a piece of property as lying "outside the disputed boundaries." *Id.* The affidavit contained no empirical evidence comparing land values inside and outside the Reservation boundaries. *Id.* 21a-22a.

> Plaintiffs' "expert" offers nothing other than conjecture to show that verbal sparring over the 1855 boundaries has caused any devaluation or decline in real estate values. Mr. Wagner presents no data or quantification as to the actual lost value caused by the dispute, but merely offers his personal belief that some effect has occurred.

Id. 22a. The district court took notice of the fact that the 1855 Reservation includes Mille Lacs Lake waterfront and

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7. *See Weisgram v. Marley,* 528 U.S. 440, 454 (2000) (expert opinion "not supported by sufficient facts to validate in the eyes of the law" cannot support jury verdict); *Brooke Group v. Brown & Williamson Tobacco*, 509 U.S. 209, 242 (1993) (expert testimony is "useful as a guide to interpreting market facts, but is not a substitute for them").

other highly desirable vacation, business and residential property; "[t]aking into account the historically strong interest in owning this lake front property, and the absence of evidence of so much as a single sale where proximity to Indian Country affected price," the court correctly found petitioners failed to demonstrate any injury or risk of future injury. *Id.*[8]

The Bank also points (Pet. at 14) to the affidavits of its Chairman, B. P. Allen. The affidavits do not claim property values *have declined*, but state in conclusory fashion that the Band's alleged assertion of regulatory authority "*will depress* the market value" of the Bank's property interests. Bank App. 58a (emphasis added). The prospective, contingent nature of Mr. Allen's assertion is underscored by his statement that the Bank intervened in this case to prevent negative impacts "which will result *if* the former 1855 reservation is found to exist along its original boundaries," or *if* the Band has the authority to license businesses within the area of the former 1855 reservation." *Id.* 58a-59a (emphasis added). Because the Band has not sought *any* relief in this case, these unsupported allegations do not establish an actual or imminent injury.

4. Controversy.

Finally, petitioners argue that because respondents are allegedly seeking to "resurrect" the 1855 Reservation, the disagreement over the Reservation's status is, by itself,

8. The County Commissioner who served as the County spokesperson for this litigation testified that property values have increased countywide in recent years, and that values within the 1855 Reservation have followed the *same*, *increasing* trend. Resp. 8th Cir. App. 67c.

enough to establish standing. However, the "presence of a disagreement, however sharp and acrimonious it may be, is insufficient by itself to meet Article III's requirements." *Diamond v. Charles*, 476 U.S. 54, 62 (1986). While a tribe's assertion of jurisdiction over nonmembers can undoubtedly have "real, practical consequence," *Hicks*, 533 U.S. at 383 (Souter, J., concurring), that does not mean a challenge to tribal jurisdiction or to the status of a reservation can be litigated in any case in which there is an abstract disagreement over tribal authority. Where, as here, there is no tribal action that has caused an actual injury to plaintiffs and no such injury is imminent, the "essential and unchanging" requirement of standing, *Lujan*, 504 U.S. at 560, has not been met.

CONCLUSION

The petitions for writs of *certiorari* should be denied.

Respectfully submitted,

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No. 04-229

IN THE

Supreme Court of the United States

COUNTY OF MILLE LACS,
Petitioner,

v.

MELANIE BENJAMIN, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF OF PETITIONER COUNTY OF MILLE LACS

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ARGUMENT

I. MOST OF THE "STATEMENT OF THE CASE" AND A SUBSTANTIAL PART OF THE "REASONS FOR DENYING THE PETITION" IN THE BRIEF IN OPPOSITION MISCHARACTERIZE THE RECORD IN THIS CASE.

The Mille Lacs Band would have this Court believe that a resurrected 1855 Mille Lacs Reservation is of little or no consequence to the non-members that constitute the majority of the population and own and populate approximately ninety percent (90%) of the area. The Band attempts to shore up this position by denying that it has attempted to exercise jurisdiction over non-members, despite pages of Band statutes that expressly claim that jurisdiction. This argument is untenable.[1]

A. In the district court, Petitioner Mille Lacs County and Petitioner First National Bank of Milaca submitted evidence that squarely refuted that position specifically with respect to non-members. *See* Pet. for a Writ of Cert. (filed by Petitioner County of Mille Lacs) at 14; Pet. for a Writ of Cert. (filed by Petitioner First National Bank of Milaca) at 9-14, 20-23.

B. In addition, the State of Minnesota, as amicus curiae, has recounted actions by the Mille Lacs Band before the Environmental Protection Agency that further undermine the credibility of the Brief in Opposition submitted by the Mille Lacs Band in this respect. As Minnesota explains, two Environmental Protection Agency examples make the point. Br. of State of Minn. as Amicus Curiae in Supp. of Pet'rs at 6-7.

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[1] Even with reference to Band members, the Brief in Opposition is incomplete. Compare discussion in the Brief in Opposition regarding the sheriff's deposition testimony that would lead one to believe that the "Band and its members had consistently complied with county zoning regulations" on fee land, with correspondence in the record from the Band Commissioner of Administration that substantiates prolonged non-compliance by the Band and Band members (and eventual compliance "under protest" immediately prior to the filing of this lawsuit). Br. in Opp'n at 8.

First, in the Underground Injection Control Program of the Environmental Protection Agency:

> [t]he Band applied to regulate septic systems in the *entire* 1855 Treaty reservation area and *asserted* in its application that it had authority to regulate *all* persons, both Band members and *non-members*, within the disputed reservation area.

Id. at 6 (emphasis added).

Secondly, with reference to the Non-Point Source Management Program of the Environmental Protection Agency:

> [t]he Band again asserted that the reservation boundary was the *1855 Treaty boundary* and that it had jurisdiction over all Band and *non-Band* members within this area.

Id. at 7 (emphasis added).

Of course, participation of the Mille Lacs Band in the Environmental Protection Agency process was founded on the express recognition of the Environmental Protection Agency: (1) that the Band established a claim to the entire 1855 Reservation by approved Band statutes, and (2) that the Band established a claim to jurisdiction over everyone in the area, also by approved Band statutes. The two volumes of Mille Lacs Band Statutes published by West Publishing Company confirm the Band's claim to the 1855 Reservation and the Band's claim to jurisdiction over everyone within that reservation. Mille Lacs Band Statutes Annotated, Volume 1, Constitution and Bylaws of the Minnesota Chippewa Tribe, Titles 1 to 15 (West Pub. Co. 1996). Mille Lacs Band Statutes Annotated, Volume 2, Executive Orders and Commissioner's Orders, Titles 16 to 25 (West Pub. Co. 1996). Co. Pet. App. 111a-114a.

In this respect, the Environmental Protection Agency's ultimate grant of "treatment as a state" designation for the Mille Lacs Band (or for any Indian tribe) is based on an Environmental Protection Agency finding, required by fed-

eral statute, that the tribe has jurisdiction over the area and all persons with that area. Br. of State of Minn. as Amicus Curiae in Supp. of Pet'rs at 4-5.

C. The Brief in Opposition also mischaracterizes the nature of the real estate disclosures. Br. in Opp'n at 7, n.2. Disclosures by so called "local" real estate agents were, in fact, contested reservation status disclosures of adverse and significant material facts required by a State of Minnesota agency, pursuant to State of Minnesota statutes and State of Minnesota rules. *See* Co. Pet. App. 201a-206a.

> [l]icensees shall disclose to any prospective purchaser *all material* facts pertaining to the property, of which the licensee is aware, which could *adversely* and *significantly* affect an ordinary purchaser's use or enjoyment of the property, or any intended use of the property of which the licensee is aware.

Minn. R. 2805.1400, subp. 3 (2003).

D. The Brief in Opposition further mischaracterizes the conditions in the area and underlying causes for a state of "civil unrest" with "public safety risks" that do not exist. Br. in Opp'n at 6. According to the Mille Lacs Band, a statement from a former attorney for the County credibly attributes the source for this purported state of affairs to "misinformation" from certain County residents. This argument is not persuasive.

The fact that a contract attorney from outside the County agreed with the *Band's* mischaracterization of the significance of reservation status is of absolutely no consequence in this case. In January of 2000, this contract attorney, with no prior experience in Federal Indian Law, sought to advise the County on this issue shortly after she contracted with the County to act as its attorney. Evidently, this attorney found the Band's argument regarding the insignificance of reservation status persuasive and the County did not agree. The County unanimously, and without regard to political affilia-

tion, squarely rejected the misinformed views of the attorney on this subject. The County also limited any further involvement of the attorney in this case and thereafter specifically sought legal representation from other sources that did not have any relationship or contacts with the Mille Lacs Band. Through the entire process, the County publicly maintained that the majority of the residents in the County agreed with the position of the County in this respect.[2]

Moreover, another attorney who lived in the County at the time (fifth generation Mille Lacs County resident) was elected as the Mille Lacs County Attorney. County Attorney Jan Kolb clearly disagreed with the substance of the contract attorney's "misinformation" correspondence. County Attorney Kolb set the record straight. Ms. Kolb concluded that "'Indian country' consequences are considerably more complex and problematic . . ." *See* Co. Ct. Appl's. App. at 484.

The County submits that "arguments" of this kind, which appear throughout the "Statement of the Case" and the "Reasons for Denying the Petitions," undermine the persuasiveness of the Brief in Opposition.

II. ADDITIONAL FACTORS SUPPORT THE POSITION OF THE COUNTY REGARDING STANDING IN THIS CASE.

The Mille Lacs Band maintains that the decision in this case regarding standing does not conflict with "any decision of this Court or any other court." Brief in Opposition at 11. In the Petition, the County has set forth the cases that support the opposite conclusion. Nothing in the Brief in Opposition undermines that analysis.

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[2] Thereafter, the County did not offer to renew any contract with the attorney or otherwise encourage her to move to or seek elected office in Mille Lacs County. The subsequent disclosure that the Mille Lacs Band had contributed hundreds of dollars to the attorney's political campaign in another county (where the Band had no interests) while she was still working for Mille Lacs County, is also a matter of record in the County.

In addition to the general standing cases cited by the County and the Bank, both the County and the Bank rely specifically on the reservation status case of this Court in *Rosebud Sioux Tribe*. The one paragraph in the Brief in Opposition that even mentions *Rosebud Sioux Tribe* does not detract from the significance of that decision as set forth in the Petitions. Br. in Opp'n at 12-13.

In addition, the one sentence in a footnote in the Brief in Opposition directed to the other major decision of this Court that the County and the Bank rely on, *Virginia v. Hicks*, 539 U.S. 113 (2003), is clearly erroneous. In that single sentence, the Band maintains that *Virginia v. Hicks* can be distinguished because there is "no similar judgment limiting county law enforcement in this case." Br. in Opp'n at 19, n.6. In fact, the decision of the Minnesota Supreme Court in *State of Minn. v. Stone*, 572 N.W.2d 725 (Minn. 1997), does precisely that. *See* the limitations on county law enforcement explicitly set forth in Stone, discussed in the County's Petition at 4.

Moreover, the Brief of South Dakota and North Dakota as *Amicus Curiae* further undermines the lack of standing argument of the Mille Lacs Band. Br. of South Dakota and North Dakota as *Amicus Curiae* in Supp. of Pet. for Writ of Cert., *County of Mille Lacs v. Benjamin, et al.* (No. 04-229). In addition to the main argument of those States supporting the importance for state or other governmental entities to be able to initiate declaratory judgment actions in federal court when questions of reservation status can not be resolved, the *amici* States set forth supplemental authority on standing from this Court that generally supports some of the legitimate governmental concerns of the County. *See* Br. of South Dakota and North Dakota as *Amicus Curiae* in Supp. of the Pet. for Writ of Cert. at 3-5, (discussing *Alfred L. Snapp & Son v. Puerto Rico*, 458 U.S. 592 (1982).)

Moreover, *Snapp & Son* also relies on the decision of this Court in *Gladstone v. Village of Bellwood*, 441 U.S. 91

(1979). *Gladstone* expressly lists other local governmental concerns regarding standing shared by Mille Lacs County in this case. In *Gladstone*, this Court noted that the Village of Gladstone (with governmental powers similar to those of Mille Lacs County and similar to those of amicus City of Wahkon, *see generally* Br. *Amici Curiae* of City of Wahkon, Township of South Harbor, and Lake Mille Lacs Association, Inc., in Supp. of Pet., *County of Mille Lacs v. Benjamin, et al.* (No. 04-229)) had standing to challenge events that threatened the tax base of that governmental entity.[3]

> The adverse consequences attendant upon a "changing" neighborhood can be profound. If petitioners' steering practices significantly reduce the total number of buyers in the Bellwood housing market, *prices may be deflected downward*. This phenomenon would be exacerbated if perceptible increases in the minority population directly attributable to racial steering precipitate an exodus of white residents. . . . *A significant reduction in property values directly injures a municipality by diminishing its tax base, thus threatening its ability to bear the costs of local government and to provide services*. Other harms flowing from the realities of a racially segregated community are not unlikely. As we have said before, "[t]here can be no question about the importance" to a community of "promoting stable, racially integrated housing." . . . . If, as alleged, petitioners' sales practices actually have begun to rob Bellwood of its *racial balance and stability*, the village has standing to challenge the legality of that conduct.

Gladstone, 441 U.S. at 109-111 (emphasis added).

At the very least, the record below substantiates that the Band's actions, to date, have contributed and continue to

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[3] The *amicus* Township of South Harbor would also be impacted to a lesser extent. *Gladstone*, 441 U.S. 91, 109-111 (1979).

contribute to a reduction in property values in the contested area. Courteau Dep., Reply App. A.[4]

Gladstone holds that local governments have standing because a reduction in property values threatens the entity's ability to bear the costs of local government and provide services. Common sense supports that holding. The courts below should have considered the type of argument submitted in *Gladstone* in support of the standing of the County.

Moreover, a resurrected 1855 reservation facilitates the Band's removal of real property from the tax rolls by the placement of that property in trust. This fact, together with the extensive reacquisition of property with casino profits and the uniform tax protests filed in conjunction with that property is of substantial concern to the County.

III. THIS COURT SHOULD ALSO SETTLE THE IMPORTANT QUESTION OF FEDERAL LAW INVOLVING THE SCOPE AND CONSTRUCTION OF THE DECLARATORY JUDGMENT ACT PRESENTED IN THIS CASE.

The County would submit that contrary to Rule 1, Federal Rules of Civil Procedure, this action has not been determined in a just, speedy and inexpensive manner. On the merits of the reservation status issue, tens of thousands of pages of legal and historical documents, interrogatories and depositions, including the County's brief on the merits, have been processed and submitted in this case to date. Nevertheless, the opinions in this case do not provide any real or meaningful

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[4] Mr. Courteau's reference to his friend that maintained that real property valuations were off their potential by as much as 25 to 30 percent because of reservation status presented the same information in oral and written testimony to the United States Senate Committee on Indian Affairs. Testimony of Darrel Smith Before the United States Senate Committee on Indian Affairs (9/24/96). Mr. Smith has worked on this question for the last decade with others from many reservation areas throughout the Country.

guidelines or authority regarding the declaratory judgment act and dismissal of this case.

It is true that part of the problem centers around the fact that the Mille Lacs Band committed almost unlimited financial resources in resisting this declaratory judgment claim (Band with tens of millions of dollars in casino profits,—several million dollars already spent by the Band, the Bank and the County). But the more significant problem in this case is that the courts below were able to ignore the general rule in the circuit that the declaratory judgment act should be liberally construed. Moreover, the courts were not bound by any decision of this Court that would require that result within meaningful guidelines.

This liberal construction issue was addressed in the County's Petition at 7. As the Petition noted, every circuit has adopted liberal guidelines for the construction of the declaratory judgment act, including the Eighth Circuit. *Id.* This Court also needs to decide that important question of federal law and, in the process, set forth the guidelines for the declaratory judgment act that are sorely needed.

IV. THE COUNTY RESPECTFULLY SUGGESTS THAT THIS COURT INVITE THE SOLICITOR GENERAL TO EXPRESS THE VIEWS OF THE UNITED STATES.

This Court has invited the Solicitor General of the United States, almost as a matter of course, to express the views of the United States regarding certiorari in federal Indian law cases such as this where the underlying dispute involves reservation status. *See e.g.* Mem. of the United States as *Amicus Curiae* at 1, *DeCoteau v. Dist. County Ct.*, 420 U.S. 425 (1975) (No. 73-1148); Mem. for the United States as *Amicus Curiae* at 1, *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977) (No. 75-562); Br. for the United States as

Amicus Curiae Supporting Resp't at 1, *Solem v. Bartlett*, 465 U.S. 463 (1984) (No. 82-1253).[5]

In the instant case, a letter opinion from an attorney in the office of the field solicitor of the Department of the Interior in St. Paul, Minnesota, purportedly resurrected the 1855 Mille Lacs Reservation. Inexplicably, the letter opinion did not cite or mention the 1913 Mille Lacs litigation or the decision of this Court in that case (both premised on reservation disestablishment). *United States v. Mille Lac Band of Chippewa Indians*, 229 U.S. 498 (1913).[6] The Environmental Protection Agency and other federal agencies have relied upon that letter opinion at the suggestion of the attorneys for the Mille Lacs Band.

Neither the Solicitor for the Department of the Interior nor the Solicitor General of the United States has expressed their views on this important question. The County respectfully submits that it would be appropriate for the Court to extend that invitation to the Solicitor General of the United States in this case.

The fact that the United States was the named defendant in *United States v. Mille Lac Band of Chippewa Indians*, 229 U.S. 498 (1913) (with the lawsuit and the decision premised on reservation disestablishment), adds substance to the suggestion. The United States could submit an authoritative explanation of the 1913 Mille Lacs litigation from the perspective of a participating litigant.

In addition, the United States played a substantial amicus curiae role in *Rosebud Sioux Tribe*, 430 U.S. 584 (1977), supporting the claims of the Rosebud Sioux Tribe regarding

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[5] The Court also invited the Solicitor General of the United States to express the views of the United States in many other cases involving the issues of Federal Indian Law.

[6] Excerpts from the conclusions in the letter opinion are reprinted in Reply App. B.

reservation status. In fact, in *Rosebud Sioux Tribe* this Court specifically noted the argument of the United States in several instances. *Rosebud Sioux Tribe*, 430 U.S. at 485, 601 n.24, 604 n.27 ("urged" "most fervently" by the United States), 613, 614 n.47. Again, Petitioners in the instant case rely extensively on *Rosebud Sioux Tribe*. And, as noted above, standing was not raised by the United States or anyone else in *Rosebud Sioux Tribe*. For this additional reason, it is respectfully submitted that the views of the United States in this case should be a matter of record in this Court.

CONCLUSION

For the reasons stated in the Petition for a Writ of Certiorari and the reasons stated in this Reply Brief, and in view of the conflict of the decision below with past decisions of this Court, the Court may also wish to consider summary reversal. Alternatively, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

EXCERPTS FROM COURTEAU DEPOSITION

[SLONIM] Q Are you aware of any information indicating that the dispute has affected property values within the county?

[COURTEAU] A That's a very general question. I know we have had letters, I have seen letters in the newspapers that have said, you know, "Tired of all the uncertainty that this issue is creating. I'm going to sell my property and move."

I've received phone calls from people telling me they're uncertain whether they want to buy property or develop property within the area in dispute. And I think *all those kinds of things lumped together are likely to have an affect [negative] on property valuations.*

I'm very concerned about that as a commissioner because the County relies heavily, you know, on the property tax for its revenues.

[SLONIM] Q Has there been—

[COURTEAU] A *—for its budgetary purposes.*

* * *

[SLONIM] Q Are you aware of information about the effect of reservation status on the property values on any other reservations?

[COURTEAU] A Yes.

[SLONIM] Q Which ones?

[COURTEAU] A Standing Rock.

[SLONIM] Q Where is that reservation?

[COURTEAU] A South Dakota.

[SLONIM] Q And what's the, as you understand it, what's the status of that reservation?

[COURTEAU] A What's the what?

[SLONIM] Q What's the status of that reservation; is that an existing reservation?

[COURTEAU] A Yes.

[SLONIM] Q What effect has reservation status had on property values there?

[COURTEAU] A A friend has told me that he believes the valuations are *off their potential* by as much as 25 to 30 percent.

* * *

[COURTEAU] A . . . Because I believe my friend's statement is likely accurate, *and* that it likely applies to many other reservations besides Standing Rock.

* * *

[COURTEAU] A . . . I recall, sir, was the Mayor of Isle commenting that he had heard directly from developers, who were interested, possibly interested, in developing in the area, that they weren't interested in doing so *until* this issue gets resolved.

* * *

[KNUDSON] Q Do you believe that requiring property owners to disclose the existence of this boundary dispute in real estate transactions has an effect on property values?

[COURTEAU] A I do, but I don't know how to measure it.

[KNUDSON] Q You think it would have a negative effect, sir?

[COURTEAU] A Yes.

* * *

[COURTEAU] A . . . The comment that my friend made to me was that it was his feeling that the property values on reservations was likely to be diminished by up to 25 or 30 percent.

[KNUDSON] Q Do you believe that the existence of the boundary dispute regarding the existence or nonexistence of the 1855 reservation has had a negative effect on property values within the affected area?

[COURTEAU] A Yes.

Excerpts from Courteau Deposition, at 68-69, 71, 72, 96-99 (Def. Mem. Supp. Summ. J., Ex. C) (emphasis added).

APPENDIX B

[SEAL]

UNITED STATES DEPARTMENT OF THE INTERIOR

OFFICE OF THE SOLICITOR
Office of the Field Solicitor
Federal Building, Fort Snelling
Twin Cities, MN 58111

February 28, 1991

BIA.TC.3397

Mr. Earl J. Barlow
Minneapolis Area Director
Bureau of Indian Affairs
15 South 5th Street
Minneapolis, Minnesota 55402

Re: Mills Lacs Reservation Boundaries

Dear Mr. Barlow:

This is in response to your request that we provide an opinion on the issue of the boundary of the Mills Lacs Indian Reservation. From time to time, various entities have speculated that the boundaries established by the Treaty of February 22, 1855, 10 Stat.1165, have been disestablished such that the reservation has been diminished and presently consist of lands held in trust for Mille Lacs Band (or the Minnesota Chippewa Tribe). For the reasons set for the below, it is our opinion that the boundaries established by the 1855 treaty remain intact and that the reservation has not been diminished.

* * *

In short, the circumstances of the Mills Lacs Reservation do not parallel either the Red Lake ceded area or the four townships ceded at White Earth. There is no clear evidence

that Congress intended to reduce the boundaries. Given the judicial standards governing analysis of boundary issues, we are of the opinion that the Mills Lacs Reservation boundaries encompass the territory described in the Treaty of 1855.

Sincerely yours,

/s/ Mark A. Anderson
MARK A. ANDERSON
For The Field Solicitor

(2) (2)

Nos. 04-229 and 04-228

Supreme Court, U.S.
FILED
SEP 17 2004
OFFICE OF THE CLERK

In The Supreme Court of the United States

MILLE LACS COUNTY, MINNESOTA,

Petitioner,

v.

MELANIE BENJAMIN, et al.,

Respondents.

FIRST NATIONAL BANK OF MILACA,

Petitioner,

v.

MELANIE BENJAMIN, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF STATE OF MINNESOTA AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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STATEMENT OF AMICUS INTEREST AND SUMMARY OF ARGUMENT

Minnesota has a strong interest in seeing that the dispute over the boundaries of the Mille Lacs Indian Reservation is judicially resolved. Therefore, it urges the Court to grant certiorari and reverse the decision of the Eighth Circuit Court of Appeals.

Minnesota agrees with Petitioners, Mille Lacs County (County) and First National Bank (Bank), that the Mille Lacs Indian Reservation consists of approximately 4,000 acres of trust land (land held in trust by the federal government for the Mille Lacs Band or its members). The Mille Lacs Band, with the agreement of the United States Department of Interior, asserts that the reservation includes the approximately 61,000 acres that composed the original reservation established by the 1855 Treaty between the United States and the Chippewa.

The dispute over the Mille Lacs reservation boundaries has unhappily pitted the State and its subdivision Mille Lacs County, against the Mille Lacs Band of Ojibwe for the last fifteen years. In the Lake Mille Lacs area, it has prompted consternation in newspaper editorials and intense disagreements between friends and neighbors. Co. Pet. App. 171a, 188a and 201a. Only the federal courts have the ability to end the quarreling among neighbors and determine whether the boundaries of the reservation, as set out in the 1855 treaty, continue to exist or not. In addition to ending contention between Band members and non-Band members living in the area, the State, for its own interest, would like the reservation boundaries issue resolved. The disagreement affects the State's ability to

implement its responsibilities under state and federal law in the disputed reservation area.

The State's inability to fully implement its laws because of the boundary dispute can be seen in two examples resulting from the management of environmental laws by the U.S. Environmental Protection Agency ("EPA"). The first is the "treatment as a state" process, while the second is the "state program authorization" process.

Under the treatment as a state provisions of the federal Water Pollution Control Act and the Safe Drinking Water Act, the Mille Lacs Band has asked the EPA for authority to apply tribal environmental laws in the disputed reservation area in lieu of EPA applying federal law. Although the State opposed the Band's application because of its reservation boundary aspects, the fact is that the treatment as a state administrative process of comment and an on-the-record review of EPA's decision does not allow for adequate presentation of the complex, historical evidence involved in reservation boundary disputes.

Likewise under the parallel state program authorization process, where a state asks EPA for approval to apply state environmental laws in lieu of EPA applying federal environmental laws, the State has been reluctant to apply for state program approval in the disputed Mille Lacs Reservation area. As with the treatment as a state process, the administrative program approval process is not designed to allow for a full presentation of the complex evidence necessary to analyze and interpret Indian treaties and Congressional enactments.

The Mille Lacs Reservation boundary dispute is an issue in both administrative processes, but evades adequate

adjudication. The proper forum for such adjudication is the federal courts. By granting *certiorari*, this Court can consider the arguments of the parties and then determine whether a controversy exists within the meaning of Article III, § 2 of the U.S. Constitution and 28 U.S.C. § 2201, and if so, return the case to the District Court for a trial on the merits.

For these reasons, the State of Minnesota files this brief in support of the Petition by the County and the Bank.

REASONS FOR GRANTING THE PETITION

I. The Notice and Comment Process For 'Treatment As A State' – Under Which The Mille Lacs Band Has Sought EPA Approval To Apply Tribal Environmental Laws To All Persons Within The Disputed Reservation – Is Not An Appropriate Forum For Resolving Complex Reservation Boundary Disputes.

Under the Water Pollution Control Act, the Safe Drinking Water Act, and the Clean Air Act, Indian tribes can apply to EPA for 'treatment as a state' to enforce tribal environmental laws in lieu of EPA applying federal environmental laws. *See* 33 U.S.C. § 1377(e) (2000) (Water Pollution Control Act); 42 U.S.C. § 300h-1(e) (2000) (Safe Drinking Water Act); and 42 U.S.C. § 7601(d) (2000) (Clean Air Act). Under these statutes and their implementing regulations, like a state, a tribe can apply to establish water quality standards, issue and enforce National Pollutant Discharge System (NPDES) permits, issue and enforce permits to dredge and fill in public

waters, regulate underground injection control systems, regulate management of sewage sludge, control non-point source pollution, enforce drinking water standards, and regulate various air quality sources. *See* 40 C.F.R. § 181.8 (2003) (water quality standards); 40 C.F.R. §§ 123.31-.32 (2003) (NPDES permits); 40 C.F.R. §§ 233.60-.61 (2003) (dredge and fill permits); 40 C.F.R. §§ 145.52-.53 (2003) (regulate septic systems); 40 C.F.R. §§ 501.22-.23 (2003) (regulate the management of sewage sludge); 40 C.F.R. § 130.6(d) and § 130.15 (2003) (control non-point source pollution); 40 C.F.R. §§ 142.72 (2003) (enforce drinking water standards); and 40 C.F.R. §§ 49.6-.7 (2003) (operate Clean Air Act programs).

To grant treatment as a state, EPA must find that the tribe has both jurisdiction over the geographic area for which it is applying as well as authority to enforce its laws over all persons within the area for which the tribe is applying for program authorization.[1]

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[1] The Water Pollution Control Act requires a showing that the functions to be exercised by the tribe pertain to management and protection of water resources that are "held by an Indian Tribe, held by the United States in trust for Indians, held by a member of an Indian tribe if such property interest is subject to a trust restriction on alienation, or otherwise within the borders of an Indian reservation." 33 U.S.C. § 1377(e)(2) (2000). The Safe Drinking Water Act requires a showing that "the functions to be exercised by the Indian tribe are within the area of the Tribal Government's jurisdiction." 42 U.S.C. § 300j-11(b)(1) (2000). EPA has interpreted these two statutes to require a showing of tribal jurisdiction over both the geographic area and the persons within the area for which the tribe is applying for treatment as a state. *See, e.g.*, 56 Fed. Reg. 64,876, 64,877-64,882 (1991) (interpreting the Clean Water Act requirements) and 53 Fed. Reg. 37,396, 37,399-37,400 (1988) (interpreting the Safe Drinking Water Act requirements.) The Clean Air Act requires a showing that "the functions to be exercised by the Indian tribe pertain to the management and protection of air

(Continued on following page)

Upon receipt of a tribe's application, EPA notifies the state and the public of the tribe's application and provides 30 to 45 days, depending on the particular EPA program, to comment on the jurisdictional aspects of the tribe's application, including any claim that the area for which the tribe is applying is not within the boundaries of the tribe's reservation.[2] *See*, 40 C.F.R. § 131.8(c) (2003) (establishment of water quality standards); 40 C.F.R. § 123.61(a) (2003) (NPDES permits); 40 C.F.R. § 233.15(e) (2003) (dredge and fill permits); 40 C.F.R. § 501.31 (sewage sludge management); 40 C.F.R. § 145.31 (2003) (regulation of septic system systems); 40 C.F.R. § 142.13 (2003) (enforcement of drinking water standards); 40 C.F.R. § 130.15 (2003) (nonpoint source management); and 40 C.F.R. § 49.9 (2003) (air quality programs).

When EPA makes a jurisdictional determination on a tribe's application for one EPA program, it will ordinarily

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resources within the exterior boundaries of the reservation or other areas within the tribe's jurisdiction." 42 U.S.C. § 7601(d)(2)(B) (2000). Although a tribe must show geographic jurisdiction, one court has held that the Clean Air Act constitutes an express delegation of authority by Congress to Indian tribes to regulate air resources within an Indian reservation. *See Arizona Public Service Co. v. E.P.A.*, 211 F.3d 1280 (D.C. Cir. 2000), *cert. denied by Michigan v. E.P.A.*, 121 S.Ct. 1600 (2001).

[2] For applications submitted before 1994, EPA had a separate prequalification process for treatment as a state. Tribes that obtained treatment as a state approval then applied for specific program approval. In 1994, EPA merged the treatment as a state determination into the program approval process so that a tribe now only submits one application. EPA also changed its terminology from treatment as a state to treatment of a tribe "in a manner similar to that in which it treats a State." *See* 59 Fed. Reg. 64,339 (1994). EPA recognized, however, that since the statutes use the term treatment as a state, use of that term may need to continue.

make the same determination for all other programs. *See* 59 Fed. Reg. 64,339, 64,340 (1994). With respect to the boundaries of a tribe's reservation, EPA has made it clear that once it decides a reservation boundary in one program application, it will not alter its position in a subsequent program application, unless there is significant new factual or legal information. *Id.*

Because of EPA's position on reservation boundary determinations, the first application of the Mille Lacs Band under the treatment as a state process was important to the State. The Mille Lacs Band first applied for treatment as a state in 1989 for the Underground Injection Control Program, involving regulation of septic tanks used to store sewage and some types of industrial waste. *See* 40 C.F.R. §§ 145.52-.53 (2003). The Band applied to regulate septic systems in the entire 1855 Treaty reservation area and asserted in its application that it had authority to regulate all persons, both Band members and non-members, within the disputed reservation area. The Minnesota Pollution Control Agency ("MPCA") opposed the Band's application, arguing in comments submitted to EPA that the boundaries of the 1855 reservation no longer existed.

In 1996, EPA approved the Band's application for treatment as a state for the Underground Injection Control Program. EPA found that the Mille Lacs Indian Reservation included the 60,000 acre reservation established under the 1855 Treaty. In response, the MPCA submitted additional comments to EPA, as did Mille Lacs County, Isle Harbor Township, and the City of Waukon (all located within the disputed reservation), and requested that EPA reconsider its decision. In 1998, in lieu of further proceedings, the MPCA, the Band, and EPA entered into a

Memorandum of Understanding (MOU), allowing EPA to continue to operate the federal program in the disputed area, with advice from both MPCA and the Band. The MOU is, however, only a temporary solution since it can be terminated on 30 days notice.

The reservation boundary dispute continues to be a real issue because of another Band application for treatment as a state in 1992, this time for the Non-Point Source Management Program under the Water Pollution Control Act. In that application, the Band again asserted that the reservation boundary was the 1855 Treaty boundary and that it had jurisdiction over all Band and non-Band members within this area. The MPCA again opposed the Band's application commenting to EPA that the boundaries of the original Mille Lacs Reservation no longer existed. EPA has not yet made a decision on the Band's application.

When reservation boundaries are in dispute, as they are with respect to the Mille Lacs Reservation, an administrative forum such as the treatment as a state process with a 30-day comment period is ill-suited to deciding issues as complex as the boundaries of an Indian reservation. Determining reservation boundaries involves interpretation of Indian treaties, federal statutes, and a broad range of historical documents, as well as extensive discovery and use of expert witnesses. These are tools not available to the parties in a 30-day comment period. In addition, any review of EPA's decision would likely be an on-the-record review, without the opportunity to further develop the issue on appeal. *See State of Montana v. E.P.A.*, 941 F. Supp. 945, 956 (D. Mont. 1996), *aff'd*, 137 F.3d 1135 (9th Cir.), *cert. denied*, 119 S.Ct. 275 (1998) (district court noted that review was on the record to

determine whether EPA's decision to grant treatment as a state to the tribe was arbitrary, capricious, or an abuse of discretion or otherwise not in accordance with law); *Wisconsin v. E.P.A.*, 266 F.3d 741, 750 (7th Cir. 2001), *cert. denied,* 122 S.Ct. 2347 (2002) (holding that EPA's grant of treatment as a state to the tribe was not arbitrary, unreasonable or contrary to law). Allowing the Mille Lacs boundary dispute to be resolved in federal court would permit this controversy to be decided in a forum capable of addressing the complexity of the issue.

II. The Unresolved Boundary Dispute Affects Minnesota's Ability To Obtain State Program Authorization From EPA And, Thus, To Fully Implement Its Environmental Laws Consistently Within The Disputed Area.

EPA's position on the Mille Lacs reservation boundary impacts the State's ability to receive state program authorization from EPA to operate state environmental programs in lieu of EPA enforcing federal environmental laws in Minnesota. State program authorization would allow Minnesota to consistently apply its environmental laws within the State.

Under most federal environmental statutes, a state can apply to EPA for approval of its state program to operate in lieu of EPA implementing federal environmental laws in the state. *See, e.g.,* 40 C.F.R. § 123 (2003) (state program application requirements for the NPDES permit program under the Water Pollution Control Act). To receive approval, a state must show that it has authority to regulate under each program applied for, and that its environmental laws are at least as stringent as federal laws. *See, e.g.,* 40 C.F.R. § 123.21, § 123.23, and § 125

(2003) (NPDES permit program). Minnesota has an extensive set of environmental laws regulating air, land, and water within the state that are administered by MPCA. *See* Minn. Stat. chs. 114C-116I (2002) and Minn. R. chs. 7000-7190 (2003). Showing that Minnesota's laws are as stringent as federal environmental laws is rarely a problem since Minnesota's environmental laws are often more stringent than federal laws. If EPA approves the state program, the state can apply its own environmental laws in lieu of EPA applying federal laws. Minnesota has received federal delegation for most programs under the major environmental statutes. This allows Minnesota to assure consistent enforcement of similar environmental protection standards throughout the state.

With respect to Indian reservations, EPA has taken the position that it will not grant program approval for a state to apply its laws on Indian reservations unless the state can show that it has jurisdiction over the entire reservation. *See, e.g.*, 58 Fed. Reg. 67,966, 67,978 (1993) (commenting on the final rule for the NPDES permit program, water quality certification program, and the sewage sludge management program); *see also* Memorandum from Dougherty, Cynthia C., Permits Division, to EPA Water Management Division Directors, *Guidance on EPA's NPDES and Sludge Management Permit Procedures on Federal Indian Reservations* 1 n.1 (Nov. 16, 1993) (where EPA states that although its regulations contemplate that a state may be able to demonstrate authority on Indian reservations, "the threshold for such a demonstration is very high, and, absent explicit Congressional authorization, it is unlikely that EPA would authorize a State to do so."). EPA considers the Mille Lacs Reservation to be the 60,000 acre 1855 Treaty reservation, relying on a 1991 opinion of the U.S. Department of the Interior's Office of the Field Solicitor. Co. Pet. App. 185a.

As a result of EPA's position on when it will authorize a state program to operate on an Indian reservation, the question of the size of the Mille Lacs Reservation becomes a critical issue. It is one which the MPCA must address each time it applies to EPA for new program authorization. In order to show that the State has jurisdiction, the MPCA has to prove to EPA that the Mille Lacs Reservation does not include most of the area within the original 1855 Treaty. MPCA's burden is made more difficult by having to prove disputed reservation boundaries within the constraints of a program application and by the fact that EPA's decision on the reservation boundaries would likely be subject to an on-the-record review. *See* 42 U.S.C. § 6976(b) (2000) (providing for review of EPA's decision to deny state program authorization in the court of appeals in accordance with the federal Administrative Procedures Act, 5 U.S.C. pts. 701-706); *see also State of Washington, Dept. of Ecology v. E.P.A.*, 752 F.2d 1465 (9th Cir. 1985) (reviewing EPA's decision to deny the State of Washington's application for hazardous waste program authorization to cover both Indians and non-Indians within Indian reservations in Washington).

Like the treatment as a state process, the state program approval process is not designed to allow for an adequate presentation of the complex, historical evidence intrinsic to an analysis and review of a number of Indian treaties, agreements, and Congressional enactments. Only a federal court can provide a forum adequate to decide a reservation boundary dispute.

Because of the inadequacy of the administrative process to resolve the reservation boundary dispute, the MPCA has reluctantly deferred applying for state program authorization within the disputed Mille Lacs reservation.

Instead, it has included language in its program applications to EPA preserving the State's position on reservation boundaries.[3]

As a consequence of the continuing boundary dispute and the difficulty of resolving it, non-Band members living within the disputed area may be subject to inspections by both EPA for compliance with federal environmental law and by the MPCA for compliance with state environmental law. *See* Co. Pet. App. 185a. Allowing the reservation boundary dispute to be heard and decided in federal court will provide an appropriate forum to resolve this issue.

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[3] For example, in the Underground Storage Tank Program application to EPA in 2000, MPCA included the following language: "This disagreement over the boundary of the Mille Lacs Indian Reservation is not, however, well suited for resolution in an administrative forum, which does not allow for adequate presentation of the complex historical evidence fundamental to an analysis and review of Indian treaty disputes. Thus, the Minnesota Pollution Control Agency (MPCA) will cooperate with EPA and allow EPA to continue to operate the Federal Underground Storage [Tank] Program within the area that the EPA describes as the Mille Lacs Indian Reservation, with the explicit written understanding that the MPCA's cooperation does not constitute a concession that EPA's position on the boundary is correct nor waiver of the state's right in the future to seek resolution of the boundary dispute in an appropriate forum." Also, when it granted law enforcement authority to the Mille Lacs Band concurrent with that of the state, the legislature expressly limited the statute so that it would not affect any dispute regarding boundaries or other matters. Minn. Stat. § 626.90, subd. 7 (2002).

CONCLUSION

For the reasons stated, Minnesota respectfully requests that the petition for writ of certiorari be granted.

Respectfully submitted,

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In The Supreme Court of the United States

COUNTY OF MILLE LACS,

Petitioner,

v.

MELANIE BENJAMIN, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF SOUTH DAKOTA AND NORTH DAKOTA AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

The States of North and South Dakota respectfully submit a brief amicus curiae pursuant to Supreme Court Rule 37.2 in support of the Petition for Writ of Certiorari.

INTEREST OF AMICUS CURIAE

Congress has created Indian reservations within the political and territorial boundaries of present-day states of the Union. Creation of an "Indian reservation," or revitalization of an "Indian reservation," by federal authorities, carries with it a life-changing set of changes in jurisdiction. The state loses most or all of its criminal jurisdiction and most of its civil jurisdiction over tribal members; likewise, the state sacrifices certain jurisdiction even over non-Indians within the reservations. Clay Smith, editor, *American Indian Law Deskbook*, 3d ed. 38, 54, 127-128, 165, 175 (2004).

Remarkably, although Congress has created reservations, it has done little or nothing to facilitate the building of good relations between other governmental units and the reservations. Most critically for the context of this case, Congress has done nothing to facilitate the ability of states or counties even to determine the *existence* of a reservation. As a consequence, North and South Dakota, and other states of the Union, necessarily look to the courts, and this Court especially, to determine with finality whether Congress has, in fact, created a reservation and maintained its existence within their boundaries. North and South Dakota thus have a strong interest,

shared with the County of Mille Lacs, in assuring that the courts are available to answer this important question.

SUMMARY OF ARGUMENT

The creation by Congress of an Indian reservation carries with it immediate jurisdictional consequences for virtually the entire population of the reservation area. When an Indian tribe proclaims the existence of an Indian reservation, and when it is joined in that proclamation by the Department of the Interior (DOI), a county which is host to the putative reservation finds itself under the immediate threat of losing large chunks of its preexisting jurisdiction. It necessarily has standing to challenge the assertions of the tribe and the United States.

Moreover, when the actions of the tribe and the DOI combine to persuade another agency of the United States, the EPA, to act in a peculiar way against the interests of the county, the concrete interest of the county is solidified further, so as to leave no doubt of its standing to challenge the claim of reservation status.

ARGUMENT

I

STANDING IS CREATED IN FAVOR OF A COUNTY WHEN, WITHIN THE BOUNDARIES OF THE COUNTY (1) A TRIBE PROCLAIMS THE EXISTENCE OF A 61,000-ACRE RESERVATION, AND (2) THE UNITED STATES, THROUGH ITS FIELD SOLICITOR, AFFIRMS THE EXISTENCE OF THE SAME 61,000-ACRE RESERVATION.

This Court in *Warth v. Seldin*, 422 U.S. 490, 498 (1975) found that the "question of standing is whether the litigant is entitled to have the court decide the merits of the dispute. . . . " The inquiry involves both constitutional and prudential concerns, and the standing doctrine is "founded in concern about the proper – and properly limited – role of the courts in a democratic society." *Id.*

This Court has further developed the concept that states, and, we argue by logical extension, counties, have a particular role in the protection of interests which nongovernmental entities do not have. In *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 601 (1982), the Court identified a set of interests which, it implied could, give rise to standing:

> Two sovereign interests are easily identified: First, the exercise of sovereign power over individuals and entities within the relevant jurisdiction – this involves the power to create and enforce a legal code, both civil and criminal; second, the demand for recognition from other sovereigns – most frequently this involves the maintenance and recognition of borders.

The case before this Court implicates both interests and thus gives rise to standing.

As the record establishes, the leadership of the Mille Lacs Tribe has proclaimed the existence of a 61,000-acre reservation. The Office of the Field Solicitor for the DOI has set forth the official position of her agency, and thus of the United States, that the 61,000-acre reservation exists. The district court below recognized that the "1855 reservation borders include much of Mille Lacs Lake and other highly desirable vacation, business and residential property." App. 14A. Although the boundaries of the alleged reservation are found within the boundaries of Mille Lacs County, the courts below found that this intersection of jurisdiction was insufficient to create standing.

The Court of Appeals in particular found that the county had failed to demonstrate, for purposes of the summary judgment motion, an "injury in fact" which was "definite and concrete." App. 23A, 25A.

The difficulty with the proposition of the Court of Appeals is that the proclamation of the 61,000-acre reservation and the recognition by the United States of the reservation as existing within a county creates actual injury to the county. The injury is to the precise interests which *Alfred L. Snapp & Son, Inc.* indicates are protectible – the ability to exercise sovereign power over individuals, to create a binding legal code, and to maintain an entity's own borders. *Alfred L. Snapp & Son, Inc.*, 458 U.S. at 601.

The court below nonetheless declined to find standing because the county had failed to identify harms which were more than "speculative." App. 25A. The court below missed the point. If a "reservation" exists, it need not be the band that disrupts the jurisdiction of the state or

county. Rather, it could easily be a private individual who makes claim to the civil or criminal jurisdictional benefits which accrue to reservation status and tribal members. The actions by a tribe proclaiming a reservation, and of the United States in recognizing it, are thus analogous to an invitation to an entire tribal membership to defy state jurisdiction. This amounts, at the very least, to a "threatened injury" which is "distinct and palpable" resulting from the putatively wrong conduct of the tribe in pronouncing the existence of the reservation. *ASARCO v. Kadish*, 490 U.S. 605, 618 (1989), *quoting Warth*, 422 U.S. at 500, 501.

II

THE CONCRETE NATURE OF THIS CONTROVERSY IS FURTHER ILLUSTRATED THROUGH THE ACTIONS OF THE UNITED STATES.

Further and compelling evidence of the concrete nature of this controversy is found in the actions of the United States. These actions have been ongoing for a decade, keeping the county in a turmoil. As noted above, in 1991 the United States Department of the Interior, Office of Field Solicitor, opined that the 61,000-acre 1855 treaty reservation existed as of that day. Based on this opinion, the EPA in 1996 approved the Mille Lacs Band application for treatment as a state for the underground injection control program. As part of this determination, the EPA necessarily found that the Mille Lacs Indian Reservation included the 61,000-acre reservation established under the 1855 treaty. *See* Brief of State of Minnesota as Amicus Curiae in Support of Petitioner, *County of Mille Lacs and First National Bank of Milaca v. Benjamin*, No. 04-229 at 5.

As a result, the county, along with other governmental entities, were forced into a dispute with the EPA and the tribe, and in 1998, the parties entered a Memorandum of Understanding which allowed the EPA to continue to operate the federal program in the disputed area. *Id.* at 5-6. This MOU is no solution, however, since it can be terminated on thirty days' notice. *Id.* at 6. The county, moreover, faces repeated such attacks on its jurisdiction through "treatment of a state" provisions in other congressionally enacted statutes. *Id.* at 4-5.

The situation faced by the County of Mille Lacs is analogous to a landowner who sees an earthen dam on his property in the process of falling apart. His contractor is at the ready but he is instructed by a higher authority that he may not move to repair the dam until it bursts, flooding his home and his field. The doctrine of standing has never required such sacrifice, and the courts below were incorrect to find that it does.



CONCLUSION

For the foregoing reasons, this Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF *AMICI CURIAE* OF CITY OF WAHKON, TOWNSHIP OF SOUTH HARBOR, AND LAKE MILLE LACS ASSOCIATION, INC., IN SUPPORT OF PETITION

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QUESTION PRESENTED

Where the Lake Mille Lacs Band of Ojibwa assert that the Mille Lacs Reservation consists of 61,000 acres, in apparent contradiction of this court's decision in *United States v Mille Lac Band of Chippewa Indians*, 229 US 4987 (1913), and simultaneously adopts its own statutes purportedly governing this expansive area in contravention of police and regulatory schemes enacted by county and municipal governments, is there an actual case or controversy permitting judicial intervention in the form of a declaratory judgment?

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IN THE

Supreme Court of the United States

No. 04-299

COUNTY OF MILLE LACS,
Petitioner,

v.

MELANIE BENJAMIN, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF *AMICI CURIAE* OF CITY OF WAHKON, TOWNSHIP OF SOUTH HARBOR, AND LAKE MILLE LACS ASSOCIATION, INC., IN SUPPORT OF PETITION

IDENTIFICATION AND INTEREST OF THE *AMICI*

WAHKON AND SOUTH HARBOR TOWNSHIP

Wahkon and South Harbor are neighboring governmental units. Wahkon is organized as a municipal corporation, South Harbor is a township. Both municipalities are located wholly or partly within the 1855 reservation boundary of the Mille Lacs Band of Ojibwe Indians ("the Mille Lacs Band" or "the band"). Wahkon and South Harbor Township lie on or near Lake Mille Lacs which is a major vacation destination in north central Minnesota. The communities are both within

largely rural Mille Lacs County. Tourism is a primary industry for each municipality due to the aesthetic attractions of Lake Mille Lacs and its environs where recreational activities include fishing, hunting, camping, and golfing. Both municipalities raise revenues through the taxation of real estate within their respective borders. Each community is also charged with the responsibility for enforcing of its own penal ordinances and regulatory schemes.[1]

LAKE MILLE LACS ASSOCIATION

The Lake Mille Lacs Association, Inc., ("Lake Mille Lacs Association") is a Minnesota non-profit corporation. Its membership is open to "any person owning property by Lake Mille Lacs, off Lake Mille Lacs, and area businesses." Its mission is "to serve as an advocate for the protection and enhancement of Mille Lacs Lake [and] to assure its preservation for future generations." To accomplish this objective, the Lake Mille Lacs Association has authorized its directors to "express their collective voice" by taking positions involving diverse issues including "economic development, property protection, and/or any other issue . . ."

STATEMENT OF THE CASE

Pursuant to an 1855 treaty between the United States and the Chippewas of Minnesota, a 61,000 acre reservation was carved out for the Mille Lacs Band of Chippewa Indians along the southern and western shores of Lake Mille Lacs. *United States v Mille Lacs Band of Chippewa Indians*, 229 US 498, 499 (1913). By the late 19th century, the Mille Lacs Band relinquished more than 90 percent of this reservation to the United States. *Id* at 501-504. As a result of litigation

[1] In Minnesota, the violation of certain local ordinances may subject an individual to both civil and criminal legal consequences. In Minnesota, violation of local penal ordinances is a misdemeanor punishable by 90 days in jail and/or a $1,000 fine. *See* Minn. Stat. § 412.231 and 609.034

brought by the Lake Mille Lacs Band challenging the compensation paid to the band and its members, this court ruled that 1889 legislation had effectively resulted in the disposal of the majority of the lands constituting the 1855 reservation. The proceeds were to be held in trust for the benefit of the Lake Mille Lacs Band and its members. *Id* at 509. This court ultimately concluded these transactions resulted in "an unqualified power of disposal over the lands as the absolute property of the government." *Id* at 510.

In 1986 the US Court of Claims again reaffirmed the relinquishment of the reservation. *Minnesota Chippewa Tribe v US*, 11 Cl. Ct. 221 (1986). Beginning in the 1980s, the Mille Lacs Band also established two highly success ful casinos which began generating massive revenue. At approximately this same time, the band began asserting that the 1855 reservation boundaries had not been relinquished, but remained intact. The Lake Mille Lacs Band's official website declared:

> The boundaries of the Mille Lacs reservation cover 61,000 square acres in Mille Lacs County.

The band enacted its own ordinances reportedly governing activities on "all lands within the exterior boundaries of the Mille Lacs reservation and Sandy Lake reservation as established by the treaty of 1855 . . ." Mille Lacs Band Statutes § 9. The band and its members began refusing to abide by regulatory and zoning ordinances established by Lake Mille Lacs County and its municipalities (Complaint, paragraph 39). The band also pressured federal agencies, with some success, to recognize its claim (Complaint, paragraph 53 D-I).

Accordingly, Petitioner Mille Lacs County commenced a legal action seeking "a declaratory judgment that the exterior boundaries of the 1855 Mille Lacs Indian Reservation have been disestablished . . ." to clarify the County's ability to

assert legal authority over the areas ceded in 1889. A local bank, the First National Bank of Milaca, intervened in the litigation supporting Petitioner. Respondents brought a motion to dismiss the complaint which the District Court treated as a motion for summary judgment since Respondents had already filed an Answer[2]. The court granted summary judgment in Respondent's favor finding: (1) the Mille Lacs Band has neither threatened nor demonstrated an intention to enforce its ordinances beyond its remaining undisputed, 4,000 acres; (2) the Mille Lacs Band and its members have consistently complied—however grudgingly—with the County's zoning regulations and state traffic laws, 262 F.Supp. 990, 997 (D. Minn); and (3) there was no legitimate evidence the band's claims resulted in a "loss or degradation of local real estate values" *Id* at 998. As a result, the District Court determined no "live controversy" existed warranting invocation of "sweeping declaratory judgment power . . ."

Petitioner subsequently appealed the District Court's determination to the Eighth Circuit. That Court affirmed the District Court's decision[3]. Petitioner is now seeking a Writ of Certiorari. This brief is submitted in support of that request[4].

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[2] Respondent's were foreclosed from filing a motion to dismiss after filing an Answer. *See* Federal Rule of Civil Procedure 12(b).

[3] However, the appellate court reversed the District Court's determination that its decision was "with prejudice" 361 F.3d 460, 464 (8th Cir. 2004).

[4] Counsel for Mille Lacs County and Respondent have furnished written consent to the filing of this brief. Counsel for the First National Bank of Milaca has verbally consented but is presently involved in a trial in another sate and his written consent is expected within a few days. As government bodies Wahkon and South Harbor Township do not require consent of other parties to file this brief. Supreme Court Rule 37.4. However, written consent for participation by the Lake Mille Lacs Association is needed.

REASONS WHY THE PETITION SHOULD BE GRANTED

I. THE DECISION OF THE EIGHTH CIRCUIT COURT OF APPEALS IS IN CONFLICT WITH THE DECISIONS OF OTHER CIRCUITS ON THIS IMPORTANT FEDERAL QUESTION.

Petitioner's Complaint sought a declaratory judgment clarifying its position within the disputed territory claimed by the Mille Lacs Band. 28 USC § 2201(a) states:

> In a case of actual controversy within its jurisdiction . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.

This statutory provision has uniformly been interpreted as a remedial measure to be "liberally construed" and "not to be interpreted in any narrow or technical sense." *Sherwood Med. Indus. Inc., v Deknatel, Inc.*, 512 F.2d 724, 729 (8th Cir. 1975), *see also Beacon Const. Co. v Matco Elec. Co., Inc.*, 521 F.2d 392, 397 (2nd Cir. 1975); *Exxon Corp. v FTC*, 588 F.2d 895, 900 (3rd Cir. 1978), *Maryland Cas. Co., v Borrow Const. Co.*, 123 F.2d 558, 565 (4th Cir. 1941); *Allstate Ins. Co., v Employers Liab. Assur. Corp.*, 445 F.2d 1278, 1280 (5th Cir. 1971); *E.Adelmann and Co., v Triple A Speciality Co.*, 88 F.2d 852, 854 (7th Cir. 1937); *Workman v Mitchell*, 502 F.2d 1201, 1206 (9th Cir. 1974); *Ohio Cas. Ins. Co., v Marr*, 98 F.2d 973, 975 (10th Cir. 1938); *McDougald v Jenson*, 786 F.2d 1465, 1481 (11th Cir. 1986).

However, in the instant case, both the District Court and Eighth Circuit appear to have substantially departed from this framework. Both courts focused on the "actual controversy" language of § 2201 and concluded that neither Petitioner nor the Intervener bank had satisfactorily demonstrated what the

District Court Judge labeled a "live controversy." The Eighth Circuit agreed claiming the financial institution's concern about the effect the band's claims to real estate pledged as collateral to the lender were merely "speculative harms based on the future intent of the band." 361 F.3d 464. Similarly, the Court of Appeals rejected the County's request for a declaratory judgment because, despite its stated position, the Lake Mille Lacs Band had ultimately yielded and allowed the County to enforce both state and local law within the disputed tracts of land.

This construction ignored the fundamental design of the Declaratory Judgment Act. The statutory scheme is intended to allow judicial intervention in brewing disputes before they become conflagrations. That is why the statute empowers a court to "declare the rights and other legal relations" of the parties before it. To ascertain if a an actionable controversy exists under Section 2201 this court instructed, nearly 50 years ago:

> . . . the question in each case is whether the facts alleged, under the circumstances, show that there is a substantial controversy between the parties having adverse legal interests of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.

Evers v Dwyer, 358 US 184, 203 (1958). Based on this general guide, a number of circuits have established substantially the following test to determine if a litigant is entitled to a declaratory judgment:

> (1) whether a declaratory action would settle the controversy; (2) whether it would serve a useful purpose in clarifying the legal relations at issue; (3) whether the declaratory remedy is being used merely for the purpose of 'procedural fencing' or 'to provide an arena for a res judicata'; (4) whether use of a declaratory judgment would increase friction between our federal and state courts and improperly encroach upon state jurisdiction;

and (5) whether there is an alternative remedy which is better or more effective.

Allstate Ins. Co., v Green, 825 F.2d 1061, 1063 (6th Cir. 1987), *State Farm Fire and Cas. Co., v Mhoon*, 31 F.3d 979, 983 (10th Cir. 1994).

These factors wholly favor the exercise of judicial authority in this matter. When the District Court and Eighth Circuit refused to act, their decisions were in conflict, not only with the positions taken by other circuits and this court, but also with other decisions of the Eighth Circuit. For example, here the appeals court reasoned the diminuation of land value as a result of the band's claims was purely speculative and did not warrant the exercise of judicial authority. Yet, in a previous decision, involving the assertion of tribal hunting and fishing rights, the Eighth Circuit allowed persons holding property interests within the disputed territory to intervene in the litigation because the band's position "may effect . . . property values." *Mille Lacs Band of Indians v State of Minnesota*, 989 F.2d 994, 998 (8th Cir. 1993). In this action, the intervener presented the testimony of a certified appraiser who testified that it was his opinion the band's newly revived claim to all 61,000 acres of the original reservation reduced property values for land owners in the disputed territories (Deposition of Roger Wagner, Tr. 72-73).

This is an issue of critical importance to both the parties and the *amici*. If land values are depressed, it effects the ability of the County and the municipalities within the county to raise revenue from property taxes. Depressed values also damage property owners within the disputed tracts, many of whom are members of the Lake Mille Lacs Association. Further, it is at least possible that the band's claims may inhibit the future ability of property owners to sell their land or the bank's ability to foreclose on its collateral. The practical effect of the Eighth Circuit's decision is to strip the bank and property owners of recourse to prophylactically

address the wholly unwarranted claims pressed by the Mille Lacs Band.

The effect of this decision on the County and its municipalities is equally troubling. The District Court received evidence that tribal members had refused to comply with local building and zoning regulations and the Complaint alleged that the Lake Mille Lacs Band had successfully pressed federal agencies, including the Bureau of Indian Affairs, and Army Corps of Engineers, to recognize its land claims (Complaint paragraphs 53E-I). As a consequence, basic government functions, such as the location and improvement of roadways, were effected. The Eighth Circuit felt this was insufficient because the parties had ultimately been able to resolve each of these disputes without civil or criminal litigation.

The problem with this reasoning is that it once again ignores the crucible purpose of a declaratory judgment—to efficiently address legal disputes at any early stage. One critical purpose of the Declaratory Judgment Act is to permit a court to declare the respective responsibilities of parties. *Continental Ins. Co., v McKain*, 821 F. Supp. 1084 (E.D. Pa 1993). It is not essential that either Mille Lacs County or the Intervener demonstrate that legal actions have been sparked by the Lake Mille Lacs Band's actions if their conduct will inevitably generate future civil proceedings or a criminal prosecution. *Simmonds Accessories Limited v Elastic Stop Nut Corp. of America*, 257 F.2d 485 (3rd Cir. 1958). Similarly, the County is not required to demonstrate tribal members have been charged with criminal offenses for their refusal to abide by local building regulations as a prerequisite to declaratory relief. *See Evers v Dwyer*, 358 US at 204. This court has already held that district courts should employ their authority under the Declaratory Judgment Act to determine a local government's ability to enforce its ordinances and regula tions when litigants having a "substantial immediate and real

interest in the validity of the statute . . . ." appear before it. *Id* at 204. This litigation plainly presented such a situation and the Court of Appeals' decision has created a wholly unnecessary conflict between the circuits and within the Eighth Circuit itself.

II. THE EIGHTH CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE SETTLED BY THIS COURT OR HAS DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT.

Petitioner argues, at some length, that this court's decision in *Rosebud Sioux Tribe v Kneip*, 430 US 584 (1977), dictated the justiciability of this particular controversy. In *Rosebud*, a South Dakota Indian tribe sought a declaratory judgment "that the original boundaries of their reservation [established in 1889] had not been diminished by three subsequent acts of Congress passed in 1904, 1907, and 1910 respectively." 430 US at 585. Justice Renquist rejected the tribe's claim, *Id* at 605, 609. It appears both the Eighth Circuit and this tribunal implicitly recognized the boundary dispute as an actual controversy within the framework of the Declaratory Judgment Act[5]. The *amici* generally agree with this analysis and believe that *Rosebud* is essentially indistinguishable from the instant litigation which also involves a boundary dispute. In that event, the appeals courts refusal to act plainly conflicts with a relevant decision of this court.

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[5] Whether this type of boundary dispute was a justiciable controversy does not appear to have been litigated in *Rosebud*, but as Petitioner's counsel notes, the Eighth Circuit and this Court must have been satisfied the boundary dispute was an actual controversy or both tribunals would have been obligated to have determined the District Court was without jurisdiction due to this shortcoming (Petition for Writ of Certiorari, p.18).

The instant case also illustrates the Eighth Circuit's quixotic and puzzling approach to reservation boundary disputes. In *Rosebud*, where the tribe invoked the court's jurisdiction to press its boundary claims, the Eighth Circuit felt this to be a justiciable controversy, albeit one decided adversely to the tribe. *Rosebud Sioux Tribe v Kenip*, 521 F.2d 87 (8th Cir. 1976). Later, when a northern Minnesota county, sought similar relief, addressing tribal claims to disputed territory, the Eighth Circuit determined that an actual controversy did not exist. *Cass Cty v United States*, 570 F.2d 737, 741 (8th Cir. 1978).

Because this court's analysis in *Rosebud* focused on the substantive claims raised by the tribe, this court should consider granting certiorari to decide an important question of federal law that has not, but should be, settled by this court. Apparently, this court's decision in *Rosebud* has been insufficient to guide at least one circuit in its decisionmaking concerning these issues. There is no opinion by this court explicitly addressing the issue presented in this case. Moreover, this court's recent decisions discussing use of declaratory judgment powers have not established any specific framework to guide lower courts nor determined whether the standards employed by lower courts are appropriate. *See Green v Mansour*, 474 US 64, 72 (1985), *Wilton v Seven Falls Co.*, 515 US 277, 286-187 (1995). Although a litigant's entitlement to a declaratory judgment must, of necessity, be a fact driven inquiry, this is an opportune moment to establish a more concrete test. This will better guide lower courts and avoid the inexplicable and troubling results seen in the Eighth Circuit.

CONCLUSION

Although not critical to the immediate issues involved in this Petition, the District Court received testimony that the Lake Mille Lacs Band, armed with its substantial casino profits, had bought several tracts of land within the disputed area. Municipalities, such as Wahkon and South Harbor Township, rely on property taxes generated from levies against this land for revenue funding crucial government services. Similarly, these municipalities are entrusted with responsibility for adopting and enforcing building and other public safety regulations within their borders. Their ability to do so is threatened by the Lake Mille Lacs Band's insistence that its reservation includes the original 61,000 acres carved out by the 1855 Treaty. These municipalities, and Mille Lacs County, should not be required to await a cataclysmic event—such as a wholesale refusal by the Lake Mille Lacs Band and its member to submit to government authority—before the legal rights and responsibilities of these parties can be established. This is the fundamental principle underlying Congress' decision to enact 28 USC § 2201.

Similarly, private land owners and others interested in the welfare of Lake Mille Lacs, such as the Lake Mille Lacs Association, should not be forced to see their property diminished in value due to the illegitimate acts of the Lake Mille Lacs Band without having any recourse to judicial intervention to remedy this situation. For these reasons, the *amici* request the Petition for Writ of Certiorari be granted.

Respectfully submitted,

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